Due service of the within Petition is hereby acknowledged this.....day of October, A. D. 1932.

_____

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*Attorneys for Respondent.*

OFFICE COPY.

# TRANSCRIPT OF RECORD

## Supreme Court of the United States

OCTOBER TERM, 1932

## No. 131

AMERICAN SURETY COMPANY OF NEW YORK,
PETITIONER,

*vs.*

TERESA MAROTTA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR CERTIORARI FILED JUNE 3, 1932

CERTIORARI GRANTED OCTOBER 10, 1932

(36,828)

# (36,828)

# SUPREME COURT OF THE UNITED STATES

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

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[fol. 1] [Caption omitted]

**IN UNITED STATES DISTRICT COURT, DISTRICT OF MASSACHUSETTS**

In Bankruptcy. No. 46461

In the Matter of TERESA MAROTTA, Alleged Bankrupt

Appeal of Teresa Marotta

CREDITOR'S PETITION—Filed July 16, 1930

To the Honorable James M. Morton, Jr., Judge of the District Court of the United States for the District of Massachusetts:

The petition of The American Surety Company of New York, a corporation existing under the laws of the State of New York and having a usual place of business in Boston within said District of Massachusetts, respectfully shows: That Teresa Marotta of Winthrop in the County of Suffolk in said District of Massachusetts, has for the greater portion of six months next preceding the date of the filing of this petition had her domicile at said Winthrop in the county of Suffolk and state and district aforesaid, and owes debts [fol. 2] to the amount of more than $1,000. That all the creditors of the said Teresa Marotta are less than twelve in number; that said Teresa Marotta is not a wage earner and is not at present engaged chiefly in farming or the tillage of the soil; that your petitioner is a creditor of the said Teresa Marotta, having provable claims amounting in the aggregate, in excess of securities held by it, to the sum of $7,003.78; that the nature and amount of your petitioner's claims are as follows:

1. Liability of said Teresa Marotta to pay the petitioner $6,673.78 under a written agreement of indemnity dated April 18, 1927 in which said Teresa Marotta agreed to indemnify and save harmless the petitioner from and against liability for breach of condition of a certain penal bond upon which, one Mario Mogliani, was the principal and the petitioner became the surety at the request of said Teresa

Marotta and for breach of condition of which by the principal on said bond, judgment and execution have issued against the petitioner in the sum of $6,673.78, which amount the petitioner has paid.

2. Liability of said Teresa Marotta under said written agreement for unpaid premiums on said bond in the amount of $150.

3. Liability of said Teresa Marotta under said written agreement for $200 counsel fees expended by the petitioner in relation to a suit against the principal on said bond in a matter within the scope of said bond.

And your petitioner further represents that said Teresa Marotta is insolvent, and that within four months next preceding the date of this petition the said Teresa Marotta committed an act of bankruptcy, in that she did heretofore, to wit, on the eighteenth day of March, 1930, transfer and convey certain real estate of which she was the owner in fee with intent to hinder, delay or defraud her creditors including the petitioner, as follows:

On March 18, 1930, said Teresa Marotta executed to Pellegrino Muollo of said Boston a deed of transfer of certain real estate belonging to her situated in said Winthrop and [fol. 3] numbered 491 Pleasant Street bounded and described as follows, namely: Beginning at a point 65 95/100 feet from the corner of Lincoln and Pleasant Streets in said Winthrop, thence North on said Pleasant Street 129 30/100 feet, thence East by two courses bounded on the North by land now or formerly owned by one Thompson the first line 99 50/100 feet, the second 55 26/100 feet, thence South 78 55/100 feet, bounded on the East by land now or formerly owned by one Bunton, thence West 212 feet to the point of beginning, bounded on the South by land now or formerly of Clark, Washburn Weston and the heirs of Hanna E. Weston and containing 16,910 square feet more or less.

And on said March 18, 1930 executed to said Pellegrino Muollo of said Boston a deed of transfer of certain other real estate belonging to her situated in said Boston on Fulton, North and Lewis Streets, being the premises on which stand stores numbered 142, 144, 146 Fulton Street and 247, 249, 251 North Street, bounded and described as follows, namely: Northwesterly by said North Street

about 48 5/10 feet. Northeasterly by said Lewis Street about 46 4/10 feet. Southeasterly by said Fulton Street about 45 feet 2 inches. Southwesterly by land now or late of George W. Ware by a broken line running through the middle of the partition wall standing partly on the said premises and partly on said land now or late of Ware, about 50 feet 5 inches.

The petitioner is informed and believes and therefore says that both of said deeds of transfer were without consideration and were made by said Teresa Marotta with the fraudulent intent and purpose of putting said property beyond the reach of her creditors including the petitioner.

On the same date, namely, March 18, 1930, said Pellegrino Muollo executed to Marciano Grella of said Boston a mortgage deed of said premises located at 491 Pleasant Street, in said Winthrop, which mortgage deed stated that the amount of the mortgage was $8,000; and on the same date, namely, March 18, 1930 said Pellegrino Muollo executed a deed of transfer of said two parcels of land, together with a third parcel of land hereinafter referred to, [fol. 4] to Arcangelo Marotta, husband of said Teresa Marotta, as trustee under a certain declaration of trust for the benefit of the children and grandchildren of said Teresa and Arcangelo Marotta. The petitioner is informed and believes and therefore says that said mortgage deed and said deed of transfer were without consideration, were executed by said Pellegrino Muollo at the request of said Teresa Marotta and were made with the fraudulent purpose and intent of hindering, delaying or defrauding her creditors, including the petitioner, and putting said real estate out of reach of said creditors.

On the same date, namely, March 18, 1930, said Teresa Marotta joined with her said husband Arcangelo Marotta in a deed of conveyance to said Pellegrino Muollo of certain other real estate situated in said Boston at numbers 268, 270, 272, 274 North Street and number 14 Lewis Street bounded and described as follows, namely: Southeasterly on North Street about 38 27/100 feet, Southwesterly on Lewis Street 47 69/100 feet, Northwesterly on land now or late of Brophy about 22 59/100 feet, and Northeasterly on land now or formerly of Currants about 45 25/100 feet.

At the date of the execution of said indemnity agreement, namely, April 18, 1927, Teresa Marotta was the

owner in fee of said last described premises, and thereafter on February 23, 1928, subsequent to the time of an injury to one Beatrice Ricci and subsequent to the institution of an action against said Mogliani for recovery of damages therefor, said Teresa Marotta executed a deed of conveyance of said last described real estate to her husband Arcangelo Marotta. The petitioner is informed and believes and therefore says that said deed of conveyance to said Arcangelo Marotta was without consideration and was made and executed with the fraudulent intent and purpose of putting said real estate out of reach of creditors, including the petitioner and that the subsequent deed of conveyance dated March 18, 1930, by Arcangelo Marotta and Teresa Marotta to said Pellegrino Muollo was without consideration and was made with the intent and purpose of [fol. 5] further removing said real estate out of reach of creditors, including the petitioner.

In the event of any adjudication, the petitioner offers to surrender for the benefit of the estate in bankruptcy any attachments which the petitioner may have on said property fraudulently conveyed.

Wherefore your petitioner prays that service of this petition, with a subpœna, may be made upon said Teresa Marotta, as provided in the Acts of Congress relating to bankruptcy, and that she may be adjudged by the Court to be a bankrupt within the purview of said acts.

American Surety Company of New York, by Charles W. Goetchius, Treasurer, Petitioner. Hutchins & Wheeler, Attorneys. Address 511 Sears Building, Boston.

*Duly sworn to by Charles W. Goetchius. Jurat omitted in printing.*

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In United States District Court

Denial of Bankruptcy—Filed July 23, 1930

At Boston, in said District, on the twenty-second day of July, A. D. 1930.

And now the said Teresa Marotta appears, and denies [fol. 6] that she has committed the act of bankruptcy set

forth in said petition, or that she is insolvent, and avers that she should not be declared for any cause in said petition alleged.

And further answering the said Teresa Marotta denies the said American Surety Company of New York are creditors or have a provable claim against her, and this she prays may be inquired of by the court.

Teresa (her X mark) Marotta.

Subscribed and sworn to before me this twenty-second day of July, A. D. 1930. George I. Cohen, Justice of the Peace.

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IN UNITED STATES DISTRICT COURT

MOTION TO DISMISS INVOLUNTARY PETITION

In the above-entitled action, the respondent respectfully moves that upon all the evidence in this case that the involuntary petition in bankruptcy filed against Teresa Marotta be dismissed.

By Her Attorney, George I. Cohen.

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IN UNITED STATES DISTRICT COURT

SPECIAL MASTER'S REPORT ON ADJUDICATION—Filed June 12, 1931

This case was referred to me by order of reference dated September 16, 1930 to ascertain and report facts on the question of adjudication.

The petitioning creditor, The American Surety Company of New York, alleged in its petition that Teresa Marotta committed an act of bankruptcy by the transfer of certain real estate on March 18, 1930, with intent to hinder, delay or defraud creditors.

The petition was filed on July 16, 1930, within four months of said alleged act.

Now, after hearing the parties, I find as follows:

The petitioner is a corporation organized under the laws of the State of New York and authorized to transact busi-

[fol. 7] ness in the Commonwealth of Massachusetts, and on said March 18th was and still is engaged in the business of acting as surety on bonds.

The alleged bankrupt, Teresa Marotta, is a resident of Winthrop in said Commonwealth, and resided there for the greater portion of the six months preceding the filing of the petition.

Teresa Marotta, at the time of the filing of the petition, had no creditors other than the petitioner, and the claim of the petitioner is not admitted by her and is the chief issue to be determined in these proceedings. She is the wife of Arcangelo Marotta. Both husband and wife are illiterate and unable to read or write either English or Italian, or to sign their names except by mark. Teresa Marotta, although she has lived in this country over thirty years, neither speaks nor understands English, except at most to a very limited extent.

In 1906 her husband purchased real estate, part of that described in the alleged act of bankruptcy, which was put in the name of his wife. This property, which was and is of considerable value, is situated on Lewis Street and Fulton Street in Boston and consists of two parcels, one of which is hereinafter referred to as the Lewis Street property, and the other as the Fulton Street property. In 1919 the husband purchased a house in Winthrop, where he and his wife resided, which was also put in the name of Teresa Marotta. The husband in 1906 and thereafter until the prohibition amendment was in the saloon business. Since then he has been a wholesale dealer in ginger ale, moxie and "near beer". The details of management of all the real estate, collection of rents, payment of taxes and interest on the mortgages, have always been managed by him.

In the spring of 1927 one Mario Mogliani, who at that time was in the fireworks business in Providence, R. I., was desirous of giving an exhibition of fireworks in Everett, Mass. Antonio Natale, employed by Mogliani at the fireworks factory in Providence, went to Arcangelo Marotta a few days previous to April 15, 1927, and as a result of his talk with Marotta took Mr. and Mrs. Marotta to the office of a lawyer with whom he was acquainted, Mr. [fol. 8] William J. Good, where on April 15, 1927 Teresa Marotta executed an instrument (Exhibit 6), by the terms

of which she agreed to indemnify the petitioner against any claim or liability arising from the execution of a fireworks bond to the State of Massachusetts, on which bond said Mario Mogliani was to be the principal and the petitioner the surety. The petitioner executed the fireworks bond above referred to, a copy of which is in evidence as Exhibit 1, after receiving this agreement and relying thereon.

At the time Teresa Marotta executed this agreement (Exhibit 6), she executed a statement of her financial condition (Exhibit 7), under which her assets were given as follows: Cash, $8,000; land and improvements, at market, $75,000; additional real estate, $15,500.

The instrument Exhibit 6 was signed by her by mark and not only witnessed but sworn to before Mr. Good. This paper (Exhibit 6) at the time it was assigned by her did not contain the words on page 1 "Prov. R. I. April 18 1927", nor the date "April 18 1927" on the third page, nor the signature "Mario Mogliani", nor that of "Raymond Buss", witness to Mogliani. In all other respects the instrument was as it now appears. The handwriting, except the parts above enumerated, had been written by Raymond Buss in Providence, the resident agent and manager of the American Surety Company for the State of Rhode Island, who had sent it on to Boston in connection with the execution of the fireworks bond on which Mogliani was to be principal and the American Surety Company surety, a bond being required by the law of Massachusetts. After the execution of the two papers, Exhibit 6 and Exhibit 7, in Mr. Good's office, they were delivered to Natale, who sent them to Buss in Providence, where Exhibit 6 was completed as to the place and date on page 1 of Exhibit 6, and where it was signed, sealed and delivered by Mogliani in the presence of Raymond Buss. This was on April 18th, on which date also the surety bond in question was signed and executed. This surety bond, of which a photostatic [fol. 9] copy (Exhibit 1) is attached to this report and together with Exhibit 6 and Exhibit 7 is made part thereof, were subsequently filed with the Commonwealth and approved by the State fire marshal and the receiver-general, some time before September 26, 1927. Exhibit 1, the copy of the original bond, does not show the copy of the seal of the Surety Company, which, however, I find was affixed

to the original instrument. I find, however, that it had not affixed to it any seal opposite the signature of Mogliani and that at the time it was executed it did not have such seal.

The consideration received by the Surety Company was paid by Mogliani and amounted to $75. No further consideration was paid.

On September 26, 1927, one Beatrice Ricci was injured by fireworks at a public exhibition in Everett, Mass., which fireworks were under the direction of Mogliani. Some time in October, 1927, a letter was sent by the petitioner, the American Surety Company, to Arcangelo Marotta. This letter was not put in evidence, but Marotta testified before me that it said something about an accident to a girl at Everett, and I find as a fact that he had knowledge of the accident at that time.

On March 15, 1928, Raymond Buss, the Providence manager of the American Surety Company, the petitioner, wrote Mrs. Marotta as follows (Exhibit 3):

"Providence, R. I., March 15, 1928.

Re 693,033-B Mario Mogliani D/B as Centredale Fireworks Co.

Mrs. Teresa Marotta, 490 Pleasant Street, Winthrop, Mass.:

Dear Madame: Under date of April 18th, 1927, you signed an indemnitor's agreement of our Company in behalf of the Centredale Fireworks Company, agreeing to hold us harmless in connection with the issuance of a bond of $15,000.00, required by the State of Massachusetts for the giving of firework exhibitions. We are informed in a letter from an attorney in Boston, a Mr. Oliver Di Cecca that he has a claim against the Centredale Fireworks Company, concern-[fol. 10] ing injuries to a girl named Beatrice Ricci. Under the terms of the indemnity agreement signed by you, you are supposed to hold this Company harmless against such claims.

Very truly yours, Raymond Buss. Raymond Buss, Manager."

On April 12, 1928, Beatrice Ricci brought suit in the Superior Court for Middlesex County against Mogliani in connection with the injuries received by her in the accident of September 26, 1927.

On July 31, 1928, Arcangelo Marotta and Teresa Marotta, through an Italian lawyer, wrote to Mr. Buss a letter attached to this report and made part hereof (Exhibit 4), in which the same number, 693033, appears as appears on the letter from Buss to Mrs. Marotta of March 15th, and I find that at the time of writing this letter Arcangelo Marotta knew of the contents of Exhibit 3. In this letter, they state that they signed a bond through Antonio Natale and Mario Mogliani and that they had decided to have the bond cancelled. The postscript states that they signed the bond on April 10, 1928. In causing this letter (Exhibit 4) to be written and signed in his name and that of his wife, Arcangelo acted as agent for his wife as well as for himself.

On August 1, 1928, Mr. Buss answered this letter explaining that what they had signed on April 10, 1928 was not a bond, but an application for a bond, and calling to their attention that the Surety Company did issue a bond in 1927 in behalf of Mogliani for $15,000 in connection with which Mrs. Marotta signed an application and indemnity agreement guaranteeing to hold the Surety Company harmless from loss as a result of the issuance of the bond. This letter I find was received by the Marottas. A copy of it (Exhibit 5) is annexed and made part of this report. No answer to this letter was received.

William E. Bennett, of the law firm of Dallinger and Stearns, counsel for the defendant Mogliani in the Ricci case, testified before me that he talked with Arcangelo [fol. 11] Marotta, telling him that there was a serious injury involved, that Mrs. Marotta was on the bond, that the case was about to go to trial, that he thought a verdict for a very large sum was likely to be rendered against the defendant; that he asked Marotta if he (Marotta) wished him to settle the case, telling him that Mogliani was not able to make an offer which was acceptable; that Marotta told Bennett that he did not want to make an offer of settlement, and Bennett asked him if he was satisfied for him to go ahead and try, telling him that Marotta had a big interest at stake and he might want to get his own attorney. Marotta said "No," that Bennett was to go ahead and try the case. In this conversation, Bennett told Marotta that Mrs. Marotta was on the bond and that Marotta "might get stuck $10,000 or $12,000."

Marotta denied that Bennett told him all this. I find, however, as a fact, that this conversation in substance took place.

Arcangelo Marotta attended the trial, which lasted several days. On March 4, 1930, the jury brought in a verdict of $10,000 against Mogliani.

Frank P. Fralli, an attorney, testified before me that during the progress of the trial Marotta came to see him with a story that his wife had signed a paper. Fralli told Marotta that owing to his actual engagements in the Superior Court he could not do anything for him at that time; that after the verdict Marotta again saw him, and as a result Fralli went to Providence and investigated the situation and, after conference with Bennett, urged Bennett to move for a new trial or for a reduction of the verdict, which had been brought in for $10,000; that he was present at the argument of the motion for new trial; that on March 29, 1930, the court made an order cutting down the verdict from $10,000 to $6,500; that as a part of the services performed by Fralli for Marotta he negotiated with counsel for the plaintiff, DiCecca; that he had at least three conferences with Marotta.

Marotta contradicted himself with reference to having engaged Fralli in connection with this matter, at first denying it, and later at a hearing on a subsequent date, at which [fol. 12] time Fralli was in court to testify for the petitioner, he admitted that he had employed Fralli as counsel. I find as a fact that the testimony of Fralli is true.

On February 23, 1928, Teresa Marotta executed a deed to her husband, Arcangelo Marotta, of the Lewis Street property in Boston, which was duly recorded the following day (Exhibit 21). This deed was acknowledged before Fralli. I find specifically that this conveyance was not made with intent to hinder, delay or defraud creditors. On March 15, 1930, twelve days after the verdict, Marotta went to one Zottoli, a lawyer, and explained to him that his wife had real estate and that he wanted to be protected. It is not clear whether Zottoli knew about why the protection was to be given, but in any event, as a result of the talk between them a declaration of trust was written out by Zottoli, which Marotta executed on March 15th. Copy of this declaration of trust (Exhibit 14) is made part of this

report, to which exhibit reference is made for further details. In this instrument Arcangelo Marotta in part declares that he holds the land with the buildings thereon, etc., "together with any other property, real, personal or mixed which he may hereafter acquire as trustee under this Declaration of Trust" to support and maintain the children of Arcangelo and Teresa. The trust was to terminate after the death of Arcangelo and Teresa, if at the death of the survivor the youngest child had attained the age of twenty-one. It also provides that when the youngest child shall have attained the age of twenty-one the trust shall terminate and the trust property be distributed among the children. The instrument gives the power to the trustee to sell or mortgage any part or the whole, invest and reinvest the proceeds. This instrument was dated March 15, 1930, acknowledged by Zottoli the same day, and duly recorded.

On March 18, 1930, the following conveyances were executed at Zottoli's office: Teresa Marotta and Arcangelo Marotta quit-claimed to Pellegrino Muollo (for copy of deed see Exhibit 10) the three parcels of real estate as follows: (1) the home in Winthrop, purchased in 1919 and still in the name of Teresa Marotta; (2) the Fulton Street [fol. 13] property in Boston, purchased in 1906, the title being still in her name; (3) the Lewis Street property purchased in 1906, and, as above stated, conveyed in 1928 by Mrs. Marotta to her husband. On the same day there was executed an alleged mortgage by Muollo to Marciano Grella of the Winthrop home for three years, with a mortgage consideration given as $8,000 (Exhibit 12). Muollo also executed an alleged mortgage of $20,000 on the Lewis Street property to one Nicola Dello Russo (Exhibit 11). Both of these mortgages were for three years. Muollo also made a quitclaim deed to Arcangelo Marotta of the Lewis Street and Fulton Street properties in Boston and of the Winthrop home (Exhibit 13). All these instruments were dated March 18, 1930 and were recorded the following day, March 19, 1930, at 1.35 p. m., at which time also there was recorded the declaration of trust above mentioned.

I find that these deeds and mortgages were all made without consideration, that both Muollo, the grantee, and the two mortgagees were "straws". They all three testi-

fied that not only was no consideration passed between the parties, but that this was done merely as a favor to and at the request of Arcangelo Marotta. I find on her own testimony that Teresa Marotta had no property other than the interest she may have had in this real estate.

On April 10, 1930, counsel in the Ricci case filed a waiver of appeal and agreement for judgment, and execution issued for $6,540.08, together with costs taxed at $100.40. Counsel for the plaintiff made a demand through an officer upon the defendant Mogliani to collect the judgment and, being unsuccessful, made demand upon the American Surety Company. On April 18, 1930, suit was brought, in accordance with statutory requirements, in the name of the Commonwealth on the bond filed by Mogliani against the American Surety Company in behalf of Beatrice Ricci in the Municipal Court of the City of Boston. Service of this writ was accepted by Hutchins & Wheeler, attorneys for the defendant, on the same day. The declaration stated [fol. 14] that demand had been made on Mario Mogliani for the payment of the execution on April 17, 1930, and that Mogliani failed to pay. On April 18, 1930, the petitioner, the American Surety Company, paid the Ricci execution. On April 30, 1930, an agreement for judgment was filed in this latter case in the amount of $6,653.78, being signed by Hutchins & Wheeler, counsel for the defendant. On May 2, 1930, judgment was entered for this amount.

On July 16, 1930, the American Surety Company brought this creditor's petition against Teresa Marotta, alleging that there were less than twelve creditors, and stating their claim to be the amount paid by the petitioner under a written agreement of indemnity so-called (that is, Exhibit 6), and setting forth as the act of bankruptcy the transfers of the real estate on March 18.

The answer denied the act of bankruptcy or insolvency, and that the American Surety Company was a creditor or had a provable claim.

The only issues in controversy are (1) whether the petitioner was a creditor with a provable claim in excess of $500 at the date the petition was filed, and (2) whether the alleged conveyances were made with intent to hinder, delay or defraud creditors.

In addition to the above, the respondent raised the issue that the burden of proof was on the petitioning creditor to

prove that Teresa Marotta was not a wage earner or a person chiefly engaged in farming or tillage of the soil.

Irrespective of the fact that, under Federal Equity Rule 30, it seems to me that this should have been raised specifically in the answer, I find as a fact on the testimony of Mrs. Marotta herself that she was "neither a wage earner nor a person engaged chiefly in farming or tillage of the soil", within the meaning of the Bankruptcy Act.

The defense raised the following points as showing that the American Surety Company was not a creditor:

(1) That there was no contract between the American Surety Company and the respondent;

[fol. 15] (2) That if there was a contract, it was voided by fraud of the American Surety Company;

(3) That there was a failure of consideration on the part of the American Surety Company, in that it did not legally execute a bond and was not legally obligated to pay on the bond;

(4) That the American Surety Company was guilty of fraud or negligence, or both, in handling the personal injury claim and the suit on the bond.

The alleged bankrupt also argued that there was no act of bankruptcy committed, but that if there were one, the Surety Company had no provable claim at the time of the alleged act of bankruptcy, namely, March 18, 1930.

With reference to the issue of fraud by the American Surety Company, there was not the slightest evidence introduced under which any fraud might be found.

Counsel for the respondent argued that the fact that the application (Exhibit 6) was signed by mark should have put the petitioner on notice. I am not wholly convinced that there may not have been misstatements made, even with the purpose of misleading the Marottas, on the part of Antonio Natale in connection with the signing of these papers (respondent's request to find facts No. 13), but even were such fraud proved, I am unable to see how under the cases this issue can be raised by Teresa Marotta as against the petitioner, the American Surety Company.

Radovsky v. Fall River Savings Bank, 196 Mass. 557.

Martin v. Campbell, 120 Mass. 126.

While, as indicated, the matter is not wholly free from doubt, on all the evidence before me I am unable to find fraud on the part of Natale. Both Marottas testified in substance that Natale stated that what he wanted them to sign was a bond to release an attachment in the amount of $1,000. They testified in substance also that the transaction before Mr. Good took only a few minutes; that they did not know that they were signing a bond of indemnity in the amount of $15,000; that this bond was not explained [fol. 16] to them, and that, being illiterate, they could not know what they were signing. Their testimony, however, especially that of Arcangelo Marotta, is inconsistent. He flatly contradicted himself with reference to the employment of Fralli. Again he stated that the information with reference to the real estate enumerated on Exhibit 7 was given by himself to Mr. Good, who testified that he wrote it on Exhibit 7, and yet that when he arrived at Mr. Good's office the Marottas testified all they did was to sign papers.

Mr. Good had little recollection of the circumstances, which occurred in 1927, in connection with the signing of the papers. He testified that he was not counsel for the American Surety Company in any way; that Natale, for whom he had previously done business, came to see him with the Marottas on the 15th of April 1927; that the handwriting in the body of Exhibit 7 was his; that he took the acknowledgment to the signatures by mark of Teresa Marotta; that Natale wanted the papers made out in connection with a bond; that he remembered that Marotta participated in the conversation and that the statements as to the property were written down by him as a result of what was told him at that time; that the other witness Haines had no recollection of the conversation; that he could not recall whether he explained to Mr. Marotta what the paper (Exhibit 6) was; that the whole matter of Exhibit 7, that is, the financial statement was discussed; that the "person did know the contents of the paper here. The person came to me with the idea of putting up certain security for the purpose of obtaining a bond. They came for that express purpose." He was asked by counsel for the petitioner: "Can you say, refreshing your memory from the documents, and bearing in mind your business practices with reference to documents of that sort, whether, in fact, there was a con-

versation with reference to the legal effect of those documents before they were signed? A. Simply an answer based on my general practice, that would be true. There would have been some talk about it."

[fol. 17] From the above excerpts of Mr. Good's testimony, and all the other testimony before me and the character of the witness, I make the inference that Mr. Good at the time was satisfied that Mrs. Marotta knew the general substance and nature of the papers she was signing by mark.

There was testimony by Natale that Mogliani paid to Marotta the sum of $800 as a consideration for the signing of these papers, $500 of which was paid by one Vallanti, also an employee of Mogliani. Vallanti testified that he brought this $500 to Marotta at his store; that he took no receipt; that it was paid in cash. Marotta absolutely denied this, but it is significant that he did admit that his wife went on some sort of a bond for Natale with the Metropolitan Casualty Company in 1924; that he did not know whether it was a fireworks bond. He also admitted that she had gone on a bail bond while she held the real estate. In answer to the question of how many times she had gone on a bail bond to his knowledge, he said "Very few times, I think one case only", and that this was for a man named Delucca before the transfers had been made; that Delucca was his brother-in-law.

Marotta's testimony was inconsistent also with reference to when he first knew that the paper which his wife had signed was a bond for $15,000 in connection with fireworks. It is not necessary to recite the substance of such testimony, as in view of all the evidence, and especially the facts of having the real estate conveyed from his wife through fictitious conveyancers, the placing of fictitious mortgages, and finally the declaration of trust, I am satisfied that his testimony is far from reliable, and that his alleged ignorance and that of his wife in connection with the signing of the bond (Exhibit 6) is not credible. But even if such evidence were to be believed and a finding should be made that because of the fact that neither he nor his wife were able to read and the transactions were not explained to them at the time of the execution of the papers, I am of opinion that the case can be distinguished

from the facts in McKinney v. Boston & Maine R. R., 217 Mass. 274, cited by counsel for Mrs. Marotta. He asked [fol. 18] me to find (see request for findings of fact No. 5) that the fact that Mrs. Marotta was an illiterate person was brought home to the petitioner, the American Surety Company, because she signed by her mark, and that "those who participated in the execution of said document witnessed her mark". In the McKinney case, the agent of the railroad procured the signature by a shipper's servant, an illiterate person, who signed the bill-of-lading by making his mark, and there was testimony that the carrier's agent did not read the contract, that no questions were asked, etc. There the court held that the fact that the shipper's servant was an illiterate person was brought home to the carrier because the bill-of-lading was signed by mark and witnessed by the carrier's agent. But in the principal case, there is no evidence that any of those present were the agents of the petitioner.

In the absence of any finding of fraud, a person signing a written agreement is bound by its terms whether he reads and understands it or not, and this rule applies to a person who cannot read or does not understand its terms because of his limited intelligence. See Wilkisius v. Sheehan, 258 Mass. 240, and cases there quoted. See also Waverley Lumber Co. v. Piantedosi, 262 Mass. 377.

In connection with the alleged fraud by the petitioner, counsel for Mrs. Marotta asked me to find that the petitioner practiced fraud on Mrs. Marotta by having her sign an instrument not completely filled out, but which was completed after her signature (requests 7 and 8) and which did not contain the name of the principal on the bond to be given (request 9), nor the signature of the principal on the application for the bond to be given (request 10), and because the American Surety Company knew the instrument (Exhibit 6) was not completed at the time she signed the same because of its own action in completing said instrument (request 11). With reference to these requests, as above recited, I have found that Exhibits 6 and 7 were in the condition as stated in these requests, but I am unable to find as a fact that such conditions constituted fraud on the part of the American Surety Company. [fol. 19] So far as this may constitute fraud in law, or as

a mixed question of law and fact, I rule, so far as this may be within my province under the reference to me to find facts, that it does not constitute legal fraud.

Counsel for Mrs. Marotta also asked me to find that the American Surety Company practiced fraud by the concealment or withholding from Mrs. Marotta at the time Exhibit 6 was executed of all material facts affecting the risks which it was its duty to disclose (request 12), or which it was its duty to disclose even in the absence of inquiry by Mrs. Marotta (request 13). With reference to these two requests, I make the same findings and rulings as are made in connection with the preceding requests.

Mr. Marotta's counsel also asked me to find that the concealment and non-disclosure of facts by the American Surety Company constituted fraud, and the false representations of Natale in procuring the said Marotta to execute the indemnity agreement constituted fraud (request 14). The first part of this request has been covered, and the latter part I do not find both because there is not sufficient evidence from which I can find that Natale was guilty of fraud, and because if he were guilty of fraud, there is no evidence from which I can find that he was the agent of the American Surety Company.

In connection with some of the above requests to find facts and the argument by counsel for Mrs. Marotta that the additions made to the original contract (Exhibit 6) after it was signed, that is, the addition of the place and date and the signature of Mogliani, attention is called to paragraph V on page 2 of Exhibit 6 as follows: "The Surety is hereby expressly authorized to fill up any blanks left herein, and to correct any errors in the description of said bond or bonds or any of them, and in the amount or date of payment of said premium or premiums." In the case of Waverley Lumber Co. v. Piantedosi, above cited, the signature of the principal obligor was not on the bond at the time of the signing by the sureties.

Counsel for Mrs. Marotta asked me to find (request 16) [fol. 20] that there is no evidence that any authority was given to the American Surety Company to fill up any blank spaces by Mrs. Marotta, and that the filling in or alterations is a material alteration of the contract. This seems to me adequately covered by my preceding finding.

He also asked me to find (request 17) that Exhibit 1 was not a bond because it was not sealed by the principal. His argument that there was a failure of consideration because the existence of a legal bond was a pre-requisite to liability on the part of Teresa Marotta, and that there was no seal against the name of the principal obligor Mogliani, although the Surety Company had placed its seal upon the instrument, I feel is entitled to more weight. G. L., chap. 377, 1929, which went into effect in that year, does away in any written instrument with the seal of wax, paper or other substance, etc., where there is a recital that the instrument is sealed, but this Act was not in force at the time the instrument was executed in 1927. It would appear that prior to this date at least, the necessity of a seal in order to constitute a bond was emphasized in the cases in the Commonwealth of Massachusetts. See Mahoney v. Emergency Fleet Corp., 253 Mass. 234, where on page 237 Chief Justice Rugg has collected numerous cases. While the bond was signed in Providence by Mogliani, the signatures of the American Surety Company were affixed by the resident vice-president and resident assistant secretary in Massachusetts, it was delivered to the Commonwealth of Massachusetts, where it was to be operative. Under the circumstances, it would appear to be governed by the Massachusetts law, in which case, although accepted by the Commonwealth and by the Surety Company, it is not clear to me that the point raised by the respondent is not well taken.

On this point, the petitioner contends that the bond was binding on the surety, even although not sealed by the principal, that the authorized agent of the petitioner delivered [fol. 21] this bond to Mogliani knowing that he intended to file it immediately at the State House in Boston, and such agent intended that the surety should be bound by it. (See testimony of Buss.) The petitioner asked me to find that this bond was filed with the treasurer and receiver-general of Massachusetts with the knowledge that there was no wafer affixed opposite the name of Mogliani and intending that the petitioner should be bound by the bond in this condition, and that the petitioner through its authorized agent did not expect that the seal would be affixed. (See petitioner's requests to find facts 12 and 13.) There was testimony by Mr. Buss, the Rhode Island agent of the petitioner,

that he knew at the time Mogliani signed Exhibit 6 that in Rhode Island a seal is not necessary, that its omission here was not an oversight, and that it was his intent that the Surety Company should be bound by it in the condition it then was. I find the facts to be as requested by the petitioner and further find that the bond was given in pursuance of the law of the Commonwealth of Massachusetts (General Laws, chap. 148, as amended by Statutes of 1921, chap. 500). Whether the fact that paragraph V on the second page of Exhibit 6 providing that the Surety Company is authorized to fill in any blanks and correct any errors, etc., precludes the raising of this point by Mrs. Marotta would appear to be a question of law beyond the scope of the reference to me, as well as the point as to whether also she is bound by the knowledge and intent of the petitioner with reference to the absence of the seal. If, as a matter of law, the issue can be raised by Msr. Marotta in these proceedings, it would seem to follow that the petitioner is not a creditor, nor entitled to bring this petition.

There was evidence by Buss that the petitioner relied upon the financial statement in Exhibit 7 and the statements contained in it as to the property of Teresa Marotta in becoming surety on the bond of Mogliani. (See petitioner's request 23.) Apart from this testimony, which was allowed against the objection of counsel for Mrs. Marotta, it would be a reasonable inference, which I make, that this was the fact. The very purpose of the information covered by this [fol. 22] Exhibit 7 was to induce the American Surety Company to execute the bond without demanding collateral. (See top of page 2 of Exhibit 7.) I find that both Arcangelo Marotta and Teresa Marotta represented that she owned the property listed on Exhibit 7, for the purpose of inducing the American Surety Company to accept the indemnity agreement (Exhibit 6) and to write a bond in reliance on such representations.

The respondent argued that the American Surety Company was guilty of fraud or negligence in the handling of the personal injury suit and the action on the bond. As to this, I find that Mr. Bennett, counsel for Mogliani, was trying his first tort case before a jury and that he had recently been admitted to the Bar. If this argument is of any weight, in view of the fact that I have found that prior

to the trial he asked Marotta whether he would be satisfied in view of the seriousness of the case to have him try it, rather than to have his own counsel, I am of opinion that the argument warrants little consideration. There is no evidence that Mr. Bennett, though young, was negligent in his conduct of the case.

The respondent argued that the money was paid by the Surety Company on April 18th, the day suit was brought in the Municipal Court on the bond; that on the same day service was accepted by counsel for the Surety Company and the agreement for judgment satisfied was filed, although under the rules of the court the matter was made returnable April 30th. In this connection, it should be borne in mind that the Massachusetts Statute with reference to these fireworks bonds (Chap. 500, Acts of 1921) provides for the bringing of this case in the name of the State Treasurer for the benefit of the person who has recovered. Under all the circumstances, I find no evidence of negligence on the part of the Surety Company.

The respondent argued that there was no act of bankruptcy in that the conveyances were merely the carrying out of an oral trust in land—that the land was held by the wife subject to an agreement on her part to hold it for the [fol. 23] benefit of her husband. He asked me to find that at the time of the purchase of the three parcels of real estate, there was an oral trust created for the benefit of Mr. Marotta (request 32), and that the conveyance in March 1928 of one of these parcels was carrying out the terms of this oral trust and enforcing its equitable obligation (request 33), and that the conveyance on March 18, 1930 of the two parcels was a conveyance to carry out the terms of such oral trust. The evidence on this point was the testimony of the Marottas that when all the parcels of land were bought, Arcangelo stated to Teresa: "I buy this piece of property and go to live on it and put it in your name, but when I want it you got to turn it over to me", and she said "Yes", and that the same testimony applied to all the parcels; that the property was purchased with the funds of the husband; that all the details of management of the property, rents, interest, etc., were carried out by the husband; that when he called for a deed from the wife of the Lewis Street property in February, 1928, she turned

it over. But against this testimony, Arcangelo Marotta also testified, confirming the testimony of Natale, that when Natale approached him with reference to the fireworks bond, he told Natale that he would have to see his wife, that his wife had the property, and he also testified that at other times she had gone on fireworks bonds and a bail bond as the owner of the real estate. Furthermore, the elaborate statement of real estate appearing on Exhibit 7 and written down by Mr. Good, was given him, as he testified and I so find, by Mr. Marotta as the property of his wife. In my opinion, the presumption is that the property was put in her name as a gift and in this interim he had acted as her agent, and not as beneficial owner. I am of the opinion that the case is similar to Tileston v. Tileston, 234 Mass. 530, and Pollock v. Pollock, 223 Mass. 382. In my opinion the inference is fairly obvious that the husband originally intended to put this property beyond the reach of his creditors, and while it might have been upset at that time by them, it does not seem to me that he and his wife can now turn around and, to avoid any creditors of the [fol. 24] wife seizing it, state that it was the property of the husband, or at least taken on an oral trust for the benefit of the husband. It is also similar to English v. English, 229 Mass. 11, where the court said: "the title to property vested absolutely in the wife as between herself and the husband, and that when either pays money or funds or transfers property to the other, there is no presumption that it is received in trust. When a trust is alleged to exist, it must be proved." In the principal case, I am not satisfied in view of the nature of the witnesses, their self-interest, and their whole action, that they are telling the truth in stating that this was an oral trust, and therefore I am unable to find, following the language of English v. English, that the trust has been proved to exist.

The respondent also contended that there was no act of bankruptcy because Teresa Marotta's state of mind is material, and there was no evidence that she knew of the existence of the indemnity agreement until April, 1930, when she was served with a subpœna in connection with a suit brought in the Equity Court by the petitioner, the American Surety Company. As to this, I am of the opinion

that the state of mind of her husband as agent in all these matters would bind her.

It was argued by the respondent that the petitioner was not a creditor at the time of the alleged act of bankruptcy, that is, on March 18, 1930, and therefore cannot bring this petition. As to this, whether a petition can be filed by a creditor depends on whether such creditor has a provable claim of $500 or more. (See sec. 59b.) The provability of this claim, apart from considerations elsewhere discussed, depends upon whether all the facts had occurred at the time of the petition necessary to fasten liability. Collier, 13th Ed., page 1422. The liability of a bankrupt as an endorser or surety which does not become fixed until after the filing of the petition is not a provable debt under sub-division a(1) of section 63 as a fixed liability absolutely owing, but if the liability becomes fixed prior to the expiration of the time for proof of claims, it is a provable debt [fol. 25] under sub-division a(4). Collier, 13th Ed., 1399, 1400. Annual Supplement, 13th Ed., pages 383-384.

In this case, there is no question but what the contingency had occurred prior to the filing of the petition. At the time of the alleged act of bankruptcy, the claim was still contingent, but it would appear that the recent tendency is to consider the situation at the time of the filing of the petition, and not at the time of the act of bankruptcy. See Collier, 13th Ed., page 1213.

Matter of VanHorn, 3 A. B. R. at page 12 (Third Circuit, 1917) regards the date of the filing of the petition as the date when the petitioner's claim is to be determined. There has, however, as pointed out in that case, been some conflict in the past. This District Court says in the Matter of Paige Motor Car Co., 41 A. B. R. 546 (U. S. District Court, 1918), that the proceedings date from the filing of the petition and prima facie at least if the petitioner is alleged to be a creditor on that date it is sufficient.

See also In re Lewis F. Perry & Whitney Co., 22 A. B. R. 772 (Mass. Dist. Ct.), affirmed in 23 A. B. R. 695.

If, as a matter of law, the absence of a seal is immaterial, then I find, and rule, that at the time of the filing of the petition the petitioner was entitled to bring this petition on

July 16, 1930. I further find that Mrs. Marotta had no other property except this real estate, either on March 18, 1930 or on the date of the filing of the petition, and that she had no other liabilities at such times, and that if she did owe the American Surety Company, her liabilities exceeded the fair value of her assets.

On all the evidence, I find that the conveyances of March 18, 1930, and the execution of the Declaration of Trust, were made by Mrs. Marotta with the specific intent to place this property beyond the reach of the petitioner and that the necessary result of their execution was to hinder, delay and defraud the petitioner, if as a matter of law the American Surety Company be held to be a creditor, and I therefore recommend that she be adjudicated bankrupt.

[fol. 26] The alleged bankrupt made numerous requests for findings of fact and rulings of law. As to requests for findings of fact, I have found in substance the following: Nos. 1, 2, 15 (in part), 18, 19, 20, 21, 22, 24, 25, 26, 27, 28, 29, 30, 31, 36, 40, 41, 43, 44, 45, 46, 47 (duplicate), and 48. The remaining requests, except No. 17, I have not found for reasons either stated in my report or because in my opinion they are not in accord with the facts. Request No. 17 I have discussed at length as a matter of law.

Numerous requests for findings of fact and rulings of law were also made by the petitioner. As regards these, I have found in substance as requested on the following: Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, in part 36, in part 37, 38, 39, in part 40, in part 41, 42, in part 43, 44. I have not found the facts requested as to that part of 41 with reference to Mr. Zottoli for reasons given in my report.

I have not passed on the rulings of law requested.

Respectfully submitted.

Daniel W. Lincoln, Referee in Bankruptcy.

Worcester, Mass., June 11, 1931.

Messrs. Hutchins & Wheeler, 511 Sears Building, Boston, Mass., Attorneys for Petitioning Creditor.

George I. Cohen, Esq., Joseph Santosuosso, Esq., 43 Tremont Street, Boston, Mass., Attorneys for Alleged Bankrupt.

EXCEPTIONS BY COUNSEL FOR THE ALLEGED BANKRUPT

1. Raymond Buss, called by the petitioner, testified under direct examination that he was the resident agent and manager of the American Surety Company for the State of Rhode Island. He was asked:

"Q. What was your intent with reference to whether the [fol. 27] Surety Company should be bound by that bond in the condition in which it then was?"

This question was objected to, which objection being overruled, the witness answered:

"It was our intention that the Company should be bound."

Exception was duly taken.

2. He was asked:

"Q. Was there anything said between you and Mr. Mogliani as to the purpose for which he was taking that bond when you delivered it to him, or what he was going to do with it?"

Objection was made, which was overruled, and the witness answered:

"A. Mr. Mogliani told me he was going to file it immediately at the State House here in Boston."

Exception was duly taken.

3. The witness was asked on direct examination:

"Q. Would you have delivered that bond if you had not had this financial statement?" (Exhibit 7.)

The question was objected to, which objection being overruled, the witness answered:

"I would not have."

Exception was taken.

4. The petitioner offered through the witness a letter dated April 16, 1927, written by Thomas J. Gargan, resident vice-president in Massachusetts of the American Surety

Company. This was objected to and marked "Exhibit 2 for identification." Subsequently Thomas J. Gargan was called by the petitioner, who identified his signature and testified that he wrote the letter. It was then offered. Objection was made, which objection being overruled, exception was taken, and the letter was admitted and marked "Exhibit 2."

One or two exceptions were taken by the petitioner, which have not been reported.

Daniel W. Lincoln.

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List of Exhibits.

1. Photostatic copy of surety bond.*
2. Letter, April 16, 1927, American Surety Company to Mr. Buss.

[fol. 28] 3. Letter, March 15, 1928, American Surety Company, by Mr. Buss, to Mrs. Marotta.

4. Letter, July 31, 1928, Mr. and Mrs. Marotta to Mr. Buss.*
5. Letter, August 1, 1928, "Manager" to Mr. and Mrs. Marotta.*
6. Application for bond and contract of indemnity.*
7. Financial Statement of Teresa Marotta.*
8. Record in Ricci v. Mogliani.
9. Record in Haigis v. American Surety Company.
10. Deed, Marottas to Muollo (certified copy).
11. Mortgage, Muollo to Nicola Dello Russo (certified copy).
12. Mortgage, Muollo to Grella (certified copy).
13. Deed, Muollo to Marotta (certified copy).
14. Declaration of trust by Arcangelo Marotta (certified copy).*
15. Extract from Record Book of Board of Trustees, American Surety Company, showing officers elected January 18, 1927.
16. Certificate from Commissioner of Insurance in re authority of Thomas J. Gargan.
17. Deed, Parker to Marotta (certified copy).
18. Deed, Clark to Marotta (certified copy).

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*Attached by reference to report and incorporated therein.

19. Deed, Earley to Marotta (certified copy).
20. Certificate of Division of Insurance in re American Surety Company and T. J. Gargan and W. I. Whitley.
21. Deed, Teresa Marotta to Arcangelo Marotta (original).
22. Subpœna, American Surety Company v. Marotta (No. 35663).
23. Subpœna, American Surety Company v. Marotta (No. 35878).

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IN UNITED STATES DISTRICT COURT

REQUESTS FOR RULINGS OF LAW

In the above-entitled action the respondent respectfully makes the following requests for rulings of law.

1. In all contracts between parties there must be a meeting of the minds, and there is no contract in law where the minds of the parties do not meet.

[fol. 29] 2. Whether a contract of indemnity has been made or not in this case depends upon the fact that the said Teresa Marotta knew of the contents and agreed to it in view of the special circumstances, that she was an illiterate person and could not read nor write English, and signed the said contract by her mark.

McKenney v. Boston & Maine Railroad, 217 Mass. 274.

3. A contract entered into because of fraud practiced upon the said Teresa Marotta by the contracting party, the American Surety Company, is void.

Province Securities Corp. v. Maryland Gas Co., 1929 Advance Sheets, 2051 at 2058.

4. Fraud on the part of the obligee, i. e. American Surety Company, will void a contract of suretyship and while not confined to positive affirmations which are untrue, may consist in the concealment or withholding by him from the surety, at the time the contract of suretyship is executed,

of material facts affecting the risk which the obligee has the opportunity and which it is his duty to disclose. The legal effect of misrepresentations or non-disclosures concerning the bond should be determined as of the date the contract of suretyship was entered into.

Maglione v. Penta, 1929 Advance Sheets, 585 at 587.

5. A bond is an obligation under seal, and if the instrument bears no seal it is not a bond and the obligation does not exist. Under the laws of the Commonwealth of Massachusetts at the time the said bond, Exhibit 1, was filed, namely April 18, 1927, a bond required a seal. The existence of a bond as provided for in agreement of indemnity, and clearly recognized by the recitals and obligation of the bond, was a pre-requisite to the liability of the indemnitor.

Burdett v. Walsh, 235 Mass. 153 at 154.
Cook v. Finger, 1930 Advance Sheets, 209.

6. A surety is under obligation to his indemnitor to properly handle the claim arising against it and employ [fol. 30] competent agents to protect the indemnitor and itself. A surety must do no act which will prejudice the indemnitor. As a matter of law no fraudulent conveyance was executed on March 18, 1930. The law whether a conveyance is fraudulent or not which occurred in Massachusetts, is determined by the Massachusetts laws.

7. A conveyance of property to carry out the terms of an oral trust in land is upon a consideration which the law recognizes, and it is the performance of an equitable obligation which the court so far as possible will protect.

Hutchins v. Mead, 220 Mass. 348, 349.
Liberty Trust Co. v. Hayes, 244 Mass. 251.
Charles A. Ferguson v. Winchester Trust Co. et al., Mass. 1929 Advance Sheets, page 1215.
Lansing Boiler & Eng. Works v. Ryerson, 128 Fed. 701.
Bailey v. Woods, 211 Mass. 37.

8. The petitioner must prove actual fraud on the part of the respondent Teresa Marotta. The petitioner must prove actual intent to hinder, delay or defraud on the part

of Teresa Marotta. There can be no intent to defraud where the grantor has no knowledge of any creditor or claims existing against her. There can be no intent to defraud if the grantor at the time of the conveyance honestly, even if wrongfully, believes there are no creditors or claims against her.

Marine Nationad Bank v. Swigart, 262 Fed. 854.
Merchants Bank v. Cole, 149 Fed. 708.

9. The American Surety Company was not a creditor or had a provable claim on March 18, 1930. The American Surety Company was not a creditor or had a provable claim on March 18, 1930, which entitled it to file an involuntary petition in bankruptcy as a petitioning creditor. The American Surety Company had no right to file a petition on July 16, 1930, as their claim on that date was not a provable claim. The American Surety Company was not a creditor on July 16, 1930, of the said Teresa Marotta, the date of the filing of the involuntary petition. The [fol. 31] American Surety Company at best had a contingent claim which is not a provable debt and could not be the basis for filing an involuntary petition on March 18, 1930. The American Surety Company at best had a contingent claim which is not a provable debt and could not be the basis for filing an involuntary petition on July 16, 1930.

10. There being no proof that the said Teresa Marotta was not a wage earner or a person chiefly engaged in farming or the tillage of the soil, this involuntary petition must be dismissed.

On all the evidence in this case, the involuntary petition in bankruptcy filed against Teresa Marotta be dismissed.

Respectfully submitted.

George I. Cohen.

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In United States District Court

Requests for Rulings of Fact

In the above-entitled action the respondent respectfully makes the following requests for rulings of fact:

1. That the signature of Teresa Marotta on the indemnity agreement was made by mark.

2. That the said Teresa Marotta, respondent, was an illiterate person and could not read or write English.

3. That the document Exhibit 6 was not read to the said Teresa Marotta or the contents of the said instrument made known to her either in English or in Italian by William J. Good or Antonio Natale, who were both present at the time she signed the said Exhibit 6.

4. That the document Exhibit 6 was not read to the said Teresa Marotta and the contents of said instrument made known to her either in English or Italian by the American Surety Company or its representative at any time.

5. That the fact that Teresa Marotta was an illiterate person was brought home to the American Surety Company by the fact that she executed Exhibit 6, indemnity agreement, by making her mark, and the further fact that those who participated in the execution of said document witnessed her mark.

[fol. 32] 6. That the said Antonio Natale practiced fraud upon the respondent in telling her the document was an attachment bond on which he was principal and she was surety, in the amount of $1,000.

7. That the said American Surety Company practiced fraud on the said Teresa Marotta by having her sign an instrument not completely filled out, but was completed after her signature.

8. That the said American Surety Company practiced fraud on the said Teresa Marotta by having her sign an instrument that was not filled out but was completed after her signature.

9. That the said American Surety Company practiced fraud on the said Teresa Marotta by having her sign an instrument which did not contain the name of the principal on the bond to be given.

10. That the said American Surety Company practiced fraud on the said Teresa Marotta by having her sign an instrument which did not contain the signature of the principal on the application of the bond to be given.

11. That the said American Surety Company is guilty of fraud in that it failed to have the said instrument com-

pleted before the said Teresa Marotta signed the same and that the said American Surety Company knew the said instrument was not completed at the time she signed the same because of its own action in completing said instrument.

12. That the American Surety Company practiced fraud on the said Teresa Marotta by the concealment or withholding from her at the time the contract of indemnity was executed all material facts effecting the risk and which it is its duty to disclose.

13. That the American Surety Company practiced fraud on the said Teresa Marotta by the concealment or withholding from her at the time the contract of indemnity was executed all material facts effecting the risk and which it is its duty to disclose, even in the absence of inquiry by the said Teresa Marotta.

14. That the concealment and non-disclosure of facts on the part of the American Surety Company constituted fraud and the false representations of Antonio Natale in [fol. 33] procuring the said Teresa Marotta to execute the indemnity agreement constituted fraud.

15. That the instrument required in accordance with its terms, immediate payment of seventy-five dollars ($75) by the indemnitor, and that no demand or request was made by the American Surety Company at that time or at any other time for the payment of this initial premium.

16. That there is no evidence that any authority was given to the American Surety Company to fill up or fill in any blank spaces by the said Teresa Marotta, the respondent. The said filling in or alterations in said agreement being after the said Teresa Marotta signed the said instrument, is a material alteration on the said contract.

17. That the said document Exhibit 1 was not a bond because it was not sealed by the principal, Mario Mogliani. (See page 9 of the Record, where counsel for the American Surety Company agrees that the bond is not sealed by the principal.)

18. That the failure to seal the bond by the American Surety Company was a deliberate act. (See page 58, bottom, and page 59 of the Record.)

19. That the American Surety Company deliberately did not affix a sticker to the said Exhibit 1, for the purpose of adding a seal to the principal's name.

20. That the said American Surety Company, on the Exhibit 6, contract of indemnity, did affix four stickers opposite the name of Mario Mogliani and Teresa Marotta even though the words "L. S." were also printed on the document.

21. That this bond was executed in fact in the State of Massachusetts.

22. That this bond was executed in contemplation of law in the State of Massachusetts.

23. That there is no evidence of any Rhode Island law introduced in this case.

24. That the bond issued in this case by the American Surety Company was an official surety bond under General [fol. 34] Laws 148 as amended by Statutes of 1921, Chapter 500 of the laws of the Commonwealth of Massachusetts, and the obligee was the treasurer and receiver general of the Commonwealth of Massachusetts.

25. That the said bond was given in pursuance of the law of the Commonwealth of Massachusetts, General Laws, Chapter 148, as amended by Statutes of 1921, Chapter 500.

26. That the said tort action for fireworks injuries heard in Middlesex Superior Court was tried by one William E. Bennett, who was trying his first tort case before a jury (page 221 of the Record).

27. That on April 10, 1930, three days after the plaintiff filed a remittur, the said American Surety Company in behalf of Mario Mogliani filed a waiver to the right of appeal or the right to file exceptions and agreed that judgment may be entered forthwith and execution issued immediately (page 74 of the Record).

28. That on April 18, 1930, suit was brought on the bond, Exhibit 1, and the said American Surety Company did not wait for the final judgment in that action but paid when the writ was brought.

29. That judgment was entered by agreement and satisfaction entered April 18, 1930.

30. That when the said two parcels of real estate were purchased in 1906 Mr. Marotta paid for the same and title was taken in Mrs. Marotta's name.

31. That when the said one parcel of real estate was purchased in 1919 Mr. Marotta paid for the same and title was taken in Mrs. Marotta's name.

32. That at the time of the purchase of the three parcels of real estate there was an oral trust created in said parcels for the benefit of Mr. Marotta.

33. That the conveyance in March, 1928, of one of these parcels was in carrying out the terms and inforcing its equitable obligation.

34. That the conveyance on March 18, 1930, of the two [fol. 35] parcels was a conveyance of property to carry out the terms of an oral trust of consideration.

35. That there was no conveyance to hinder, delay or defraud creditors in the conveyance of March, 1930.

36. That there was no conveyance to hinder, delay or defraud creditors in the conveyance of February, 1928.

37. That at the time of the said conveyance in March, 1930, the said Teresa Marotta did not believe that she had any creditors.

38. That the said Teresa Marotta believed she had signed an attachment bond for $1,000 in 1927 for one Natale and upon subsequent inquiry was told by him that the matter was all fixed, and she believed in March, 1930, she had no creditors or anyone having any claim or contingent liability against her.

39. That she heard about the claim by reason of the indemnity agreement for the first time in April, 1930 (page 202 of the Record).

40. That on March 18, 1930, the American Surety Company did not have a provable claim against the said Teresa Marotta.

41. That the judgment of Beatrice Ricci against Mario Mogliani was not entered until April 10, 1930.

42. That there is no evidence that any demand was made on Mario Mogliani to pay the said judgment.

43. That on March 18, 1930, Teresa Marotta had no other creditors or claims with the exception possibly of this claim with the American Surety Company.

44. That the claim of the American Surety Company on March 18, 1930, was contingent upon the said Beatrice Ricci procuring final judgment against Mario Mogliani, that if he should fail to pay the said judgment, the American Surety Company should be compelled to pay the said judgment.

45. That none of these contingencies had occurred March 18, 1930.

46. That the said American Surety Company had no provable claim on March 18, 1930.

[fol. 36] 47. That the said American Surety Company had no provable debt on March 18, 1930.

48. That the said American Surety Company had no liquidated debt on March 18, 1930.

49. That the said American Surety Company had no provable claim at the time of filing petition, July 16, 1930.

50. That there is no evidence in the present case that the said Teresa Marotta was not either a wage earner or a person chiefly engaged in farming or the tillage of the soil.

51. That on all the evidence in this case, the involuntary petition in bankruptcy filed against Teresa Marotta be dismissed.

Respectfully submitted.

George I. Cohen.

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IN UNITED STATES DISTRICT COURT

ADJUDICATION OF BANKRUPTCY—June 24, 1931

At Boston, in said District, on the twenty-fourth day of June, A. D. 1931, before the Honorable James A. Lowell,

Judge of said Court in Bankruptcy, the petition of American Surety Company of New York, that Teresa Marotta be adjudged a bankrupt, within the true intent and meaning of the Acts of Congress relating to bankruptcy, having been heard and duly considered, the said Teresa is hereby declared and adjudged a bankrupt accordingly.

Witness the Honorable James A. Lowell, Judge of the said court, and the seal thereof, at Boston, in said district, on the twenty-fourth day of June, A. D. 1931.

Mary E. Prendergast, Deputy Clerk. (Seal.)

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IN UNITED STATES DISTRICT COURT

FINDINGS OF FACT AND CONCLUSIONS OF LAW

In the above-entitled case, which was heard upon the report of the special master and the transcript of testimony and the exhibits which had been introduced in evidence before the special master, the court makes the following findings of fact and conclusions of law:

[fol. 37] Findings of Fact

1. The petitioning creditor, the American Surety Company of New York, is a corporation organized under the laws of the State of New York and authorized to transact business in the Commonwealth of Massachusetts and engaged in the business of acting as surety on bonds.

2. The alleged bankrupt, Teresa Marotta, is a resident of Winthrop in the Commonwealth of Massachusetts and resided there for the greater portion of the six months preceding the filing of the petition. She was not at the date of the filing of the petition, or since that time, a wage earner or engaged chiefly in farming or tillage of the soil.

3. The creditors of Teresa Marotta at the time of the filing of the petition were less than twelve in number. At the time of the filing of the petition, the alleged bankrupt had no creditors other than the petitioner.

4. Teresa Marotta is the wife of Arcangelo Marotta. Both Teresa Marotta and Arcangelo Marotta are illiterate

and unable to read or write either English or Italian or to sign their names except by a mark. Teresa Marotta, although she has lived in this country over thirty years, neither speaks or understands English except to a very limited extent.

5. In 1906 Arcangelo Marotta purchased real estate, part of that described in the alleged act of bankruptcy, which was put in the name of Teresa Marotta. This property, which was and is of considerable value, is situated on Lewis Street and Fulton Street in Boston and consists of two parcels, one of which is hereinafter referred to as the Lewis Street property, and the other as the Fulton Street property. In 1919, Arcangelo Marotta purchased a house in Winthrop, where he and his wife resided, which was also put in the name of Teresa Marotta. Arcangelo Marotta in 1906 and thereafter until the prohibition amendment, was in the saloon business. Since then he has been a wholesale dealer in ginger ale, moxie and "near bear". The details of management of all the real estate, collection of [fol. 38] rents, payment of taxes and interest on the mortgages, have always been managed by him.

6. In the spring of 1927 one Mario Mogliani was in the fireworks business in Providence, Rhode Island. Antonio Natale, who was in the employ of Mogliani, went to Arcangelo Marotta a few days before April 15, 1927, and, as a result of a talk with Arcangelo Marotta, took Arcangelo Marotta and Teresa Marotta to a lawyer with whom he was acquainted, Mr. William J. Good. Teresa Marotta, on April 15, 1927, executed, in Mr. Good's presence, an instrument which was introduced in evidence as Exhibit 6 and is made a part hereof. By the terms of this instrument (hereinafter referred to as the indemnity agreement) she agreed to indemnify the petitioner against any claim or liability arising from the execution of a fireworks bond to the Commonwealth of Massachusetts, on which bond Mario Mogliani was to be the principal and the petitioner was to be the surety, and against any claim or liability arising from other suretyship in lieu of said bond. Among the clauses in this indemnity agreement to which Mrs. Marotta agreed was the following:

"VI. That this agreement shall cover not only the suretyship above recited, but all alterations, renewals, extensions

or modifications thereof which may be requested or assented to by the principal named in such obligation."

7. At the time when Teresa Marotta executed the indemnity agreement, she also executed a statement of her financial condition which was introduced in evidence as Exhibit 7 and is made a part hereof. In this financial statement her assets were given as follows: Cash, $8,000; Land and improvements, at market $75,000; Additional real estate, $15,500. Both papers were signed by Teresa Marotta by her mark in the presence of Mr. Good.

8. At the time the indemnity agreement, Exhibit 6, was signed by Teresa Marotta, it did not contain the words on page 1, "Prov. R. I. April 18 1927", nor the date "April 18 1927" on the third page, nor the signature "Mario Mogliani", nor that of "Raymond Buss", witness to [fol. 39] Mogliani. In all other respects the instrument was as it now appears.

9. The information now found in Exhibit 7 with reference to the real estate and its value was given by Arcangelo Marotta to Mr. Good in the presence of Teresa Marotta and was written down by Mr. Good in the presence of both. Mr. Good was satisfied at the time that Mrs. Marotta knew the general substance and nature of the papers which she was signing. Mr. Good was not acting in the matter as an agent or attorney of the Surety Company and no agent or representative of the Surety Company was present at the time these papers were signed.

10. Both Arcangelo Marotta and Teresa Marotta knew the nature of the instruments which she signed.

11. Both Arcangelo Marotta and Teresa Marotta represented that she owned the property listed on Exhibit 7 for the purpose of inducing the petitioner to accept the indemnity agreement, Exhibit 6, and to write a bond in reliance on such representations.

12. After the execution of the two papers, Exhibit 6 and Exhibit 7, in Mr. Good's office, they were delivered to Mr. Natale who sent them to Raymond Buss in Providence, Rhode Island. Mr. Buss was the resident agent and manager of the American Surety Company for the State of

Rhode Island. Exhibit 6 was completed by employees of the petitioner in its Providence office as to the place and date on page 1 of Exhibit 6, and was signed, sealed and delivered by Mogliani in Providence in the presence of Mr. Buss on April 18, 1927.

13. The "fireworks bond" referred to in Exhibit 6 is the statutory bond required by the provisions of the Massachusetts statutes (Acts of 1921, c. 500) as a condition precedent to the giving of a permit for a public display of fireworks in Massachusetts.

14. On April 18, 1927, Raymond Buss, acting for the petitioner, delivered to Mario Mogliani a written instrument (hereinafter called "the bond") which was subsequently filed by Mogliani with the treasurer and receiver general of the Commonwealth of Massachusetts and approved by the State fire marshal and the treasurer and re- [fol. 40] ceiver general at some time before September 26, 1927.

15. Before this bond was delivered by Buss to Mogliani, it had been signed and sealed by the petitioner acting by its resident vice-president and its resident assistant secretary in Massachusetts, who were authorized to execute such bonds. It had also been signed by Mogliani, but had not been sealed by him by the affixing of a wafer or other seal. The word "Seal" which appears opposite his signature in Exhibit 1 was printed on the blank before he signed it.

16. In executing this bond, the petitioner relied on the indemnity agreement, Exhibit 6, and on the statement as to the property of Teresa Marotta which were contained in the financial statement, Exhibit 7.

17. The petitioner, acting through Raymond Buss, its authorized agent, delivered the bond to Mario Mogliani knowing that there was no seal against Mogliani's name and knowing also that Mogliani intended to file this bond immediately at the State House at Boston; and the petitioner intended to be bound by the bond in the condition in which it then was.

18. Said bond was filed with the treasurer and receiver general of the Commonwealth of Massachusetts in the same

condition in which it was delivered by Buss to Mogliani. A copy of said bond (except for the seal of the petitioner) was introduced in evidence as Exhibit 1 and is made a part hereof. This copy, which was a photostat, does not show the seal of the petitioner which was affixed to the original bond. The form of the bond, as it was delivered to the treasurer and receiver general, was assented to by Mario Mogliani, who had caused it to be delivered.

19. On September 26, 1927, one Beatrice Ricci was injured by the discharging of fireworks under the direction of Mogliani at a public exhibition of fireworks in Everett, Massachusetts. Some time in October, 1927, the petitioner notified Arcangelo Marotta, by letter, of the accident.

20. On March 15, 1928, Raymond Buss, acting for the [fol. 41] petitioner, wrote Teresa Marotta a letter, which was introduced in evidence as Exhibit 3 and is made a part hereof, notifying her that a claim had been presented on behalf of Beatrice Ricci and referring to the indemnity agreement which had been signed by Teresa Marotta.

21. On July 21, 1928, Arcangelo Marotta, who knew at the time the contents of the letter Exhibit 3, acting as agent for Teresa Marotta as well as for himself, caused to be written to Mr. Buss a letter which was introduced in evidence as Exhibit 4 and is made a part hereof. Mr. Buss replied by a letter dated August 1, 1928, which was introduced in evidence as Exhibit 5 and is made a part hereof. Mr. and Mrs. Marotta received this letter but did not reply to it.

22. On April 12, 1928, Beatrice Ricci brought an action in the Superior Court for Middlesex County, Massachusetts, against Mario Mogliani to recover for the injuries received by her on September 26, 1927, from the discharge of fireworks at said exhibition in Everett. A copy of the record in this case was introduced in evidence as Exhibit 8 and is made a part hereof. Before this suit was tried, the attorney for Mogliani told Arcangelo Marotta that Mrs. Marotta was on the bond, that the case was about to go to trial and he thought a verdict for a very large sum was likely to be rendered against the defendant, and he asked Marotta whether he wanted to get his own attorney.

Marotta told Mogliani's attorney to go ahead and try the case. Arcangelo Marotta attended the trial of the case, which lasted several days. On March 4, 1930, the jury brought in a verdict for $10,000 against Mario Mogliani.

23. During the progress of the trial Arcangelo Marotta consulted Frank P. Fralli, an attorney-at-law, stating that his wife had signed a paper. After the verdict Marotta saw Fralli again and, as a result, Fralli went to Providence and investigated the situation and urged the attorney for Mogliani to move for a new trial. Such a motion was made and on March 29, 1930, the court ordered the verdict cut down to $6,500. As part of the services performed for [fol. 42] Marotta, Fralli negotiated with counsel for the plaintiff in the Ricci suit.

24. The acts of Arcangelo Marotta relating to the action brought by Beatrice Ricci against Mario Mogliani were done as agent for Teresa Marotta.

25. The property which was purchasel by Arcangelo Marotta, as stated in finding 5 above, belong to Teresa Marotta from the time it was acquired and placed in her name in 1906 and 1919. This was the same real estate which was described in the financial statement Exhibit 7.

26. On February 23, 1928, Teresa Marotta executed a deed to her husband of property on Lewis Street, Boston, being the first two items described in the indemnity agreement Exhibit 7. This conveyance was not made with intent to hinder, delay or defraud creditors. This deed was introduced in evidence as Exhibit 21, and is made a part hereof.

27. On March 15, 1930, eleven days after the verdict in the Ricci suit, Arcangelo Marotta went to one Zottoli, a lawyer, and, as a result of the talk between them, a declaration of trust was drawn by Zottoli which Arcangelo Marotta executed on March 15, 1930. A copy of this declaration of trust was introduced in evidence as Exhibit 14 and is made a part hereof. By this instrument Marotta declared that he held the land described therein, together with any other property which he might afterward acquire, as trustee to support and maintain the children of Arcangelo and Teresa Marotta. The trust, under its terms, was to terminate when the youngest child attained the age of twenty-one

years and the property was to be distributed among the children.

28. On March 18, 1930, Teresa Marotta and Arcangelo Marotta conveyed to Pellegrino Muollo (by a quitclaim deed a copy of which was introduced in evidence as Exhibit 10 and is made a part hereof) the three parcels of real estate, namely (1) the home in Winthrop purchased in 1919 and still in the name of Teresa Marotta; (2) the Fulton Street property in Boston purchased in 1906 (being the parcel designated as 247-251 North Street in Exhibit [fol. 43] 7), title to which was still in her name; and (3) the Lewis Street property purchased in 1906 (being the first and second items of real estate described in Exhibit 7), which had been conveyed in 1928 by Mrs. Marotta to her husband. On the same day Muollo executed an alleged mortgage to Marciano Grello of the Winthrop home for a consideration stated as eight thousand dollars. A copy of this mortgage was introduced in evidence as Exhibit 12 and is made a part hereof. At the same time Muollo also executed an alleged mortgage on the Lewis Street property for twenty thousand dollars ($20,000) to Nicola Dello Russo. A copy of this mortgage was introduced in evidence as Exhibit 11 and is made a part hereof. Muollo then executed a quitclaim deed to Arcangelo Marotta, as trustee under the declaration of trust described in the preceding finding, of the Lewis Street and Fulton Street properties and the Winthrop home. A copy of this deed was introduced in evidence as Exhibit 13 and is made a part hereof. These instruments were all prepared by Mr. Zottoli, were all dated March 18, 1930, and were recorded on March 19, 1930, at which time said declaration of trust was also recorded.

29. The arrangements for the drawing of the documents referred to in the two preceding findings were made by Arcangelo Marotta acting as agent for Teresa Marotta.

30. All of the conveyances described in finding 28, including the deed which was signed by Teresa Marotta, were made without consideration and both Muollo, the grantee, and the two mortgagees were straws who acted as a favor to and at the request of Arcangelo Marotta. Teresa Marotta had no property on March 18, 1930, other than

her interest in the real estate described in such conveyances. These conveyances, including the deed from Arcangelo Marotta and Teresa Marotta to Muollo, were made with the specific intent by Teresa Marotta to place the property conveyed beyond the reach of the petitioner, and to hinder, delay and defraud the petitioner.

31. On April 10, 1930, judgment was entered for the plaintiff in the suit of Beatrice Ricci v. Mario Mogliani for [fol. 44] $6,540.08, with costs taxed at $110.40, and execution was issued. Counsel for Beatrice Ricci made a demand through an officer on Mogliani to collect this judgment and, being unsuccessful, made demand upon the petitioner. On April 18, 1930, an action was brought against the petitioner in the Municipal Court of the City of Boston in accordance with statutory requirements on the bond filed by Mogliani with the treasurer and receiver general, for the benefit of Beatrice Ricci. On the same day, after this suit was brought, the petitioner paid the amount of the Ricci execution to counsel for Beatrice Ricci. On April 30, 1930, an agreement for judgment for the plaintiff for $6,653.78 was filed in said action in the Municipal Court of the City of Boston. This was the amount which had been paid by the petitioner on the Ricci execution.

32. An April 9, 1930, the petitioner filed a bill in equity in the Superior Court for Suffolk County, Massachusetts, against Teresa Marotta and others, praying that the conveyances and mortgages described in finding 28 above should be set aside as fraudulent, and filed a notice of this bill in the Registry of Deeds for Suffolk County. No injunction was issued in this suit and it has not been tried.

33. On May 15, 1930, after the payment by the petitioner of the amount of the Ricci judgment, the petitioner filed a second bill in equity in the Superior Court for Suffolk County against Teresa Marotta and others, seeking to recover the amount paid by the petitioner and to reach and apply the real estate transferred by said conveyances in satisfaction of the petitioner's claims against Teresa Marotta under her indemnity agreement. The petitioner alleged in this bill that said real estate had been fraudulently conveyed by Teresa Marotta. In this suit a temporary injunction was issued on May 22, 1930, against

Arcangelo Marotta and the straw mortgagees, restraining them from conveying or encumbering said real estate or foreclosing the mortgages and notice of the bringing of this bill in equity was also filed in the Registry of Deeds for [fol. 45] Suffolk County on May 15, 1930. This suit is still pending and has not been tried.

34. As a result of the conveyances made on March 18, 1930, Teresa Marotta was then insolvent.

Conclusions of Law

1. The petitioner was a creditor of Teresa Marotta at the date of the filing of the petition in bankruptcy having a provable claim against said Teresa Marotta exceeding one thousand dollars in amount. Teresa Marotta was indebted to the petitioner in the amount of at least $6,653.78 at the time the petition was filed.

2. Teresa Marotta committed an act of bankruptcy on March 18, 1930, by conveying the parcels of real estate in Winthrop and on Fulton and North Streets, Boston, with intent to hinder, delay and defraud her creditor, the petitioner.

3. The fact that the petitioner was the only creditor of Teresa Marotta on March 18, 1930, and also at the date of the filing of the petition, does not prevent the petitioner from maintaining this petition.

4. The proceedings in the bills in equity brought by the petitioner in the Superior Court for Suffolk County do not prevent the petitioner from maintaining this petition.

5. On all the facts the respondent is liable to the petitioner on the indemnity agreement Exhibit 6 for the amount paid by the petitioner in satisfaction of the judgment in the case of Ricci v. Mogliana notwithstanding the failure of Mario Mogliana to affix his seal to the bond filed with the treasurer and receiver general.

6. On all the facts it is not a defense to the respondent that the petitioner paid the amount of the Ricci judgment after suit had been brought against it on the bond which was executed by it and without waiting for a judgment in that suit on the bond.

7. The conveyance by Teresa Marotta of her property as described in finding 28, which was made with the specific intent to place such property beyond the reach of the peti- [fol. 46] tioner and thereby to hinder, delay and defraud the petitioner, was an act of bankruptcy notwithstanding the fact that it was made before any judgment had been entered in the suit of Ricci v. Mogliani and before any payment of such judgment had been made by the petitioner.

8. On all the facts the respondent Teresa Marotta should be adjudicated bankrupt.

All of the foregoing rulings were made against the objection and exception of counsel for the alleged bankrupt.

Allowed July 13, 1931.

J. A. L., D. J.

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IN UNITED STATES DISTRICT COURT

PETITION FOR APPEAL OF TERESA MAROTTA—Filed July 13, 1931

And now comes Teresa Marotta, the alleged bankrupt named in an involuntary petition in bankruptcy filed against her in the said court of July 16, 1930, and, feeling aggrieved by the order entered in the above-entitled cause on June 24, 1931, adjudicating said Teresa Marotta a bankrupt, does hereby appeal from the said order or decree to the United States Circuit Court of Appeals for the First Circuit for the reasons set forth in the assignment of errors filed herewith and prays that an appeal be allowed and that citation be issued as provided by law, directed to the American Surety Company of New York, the petitioner named in said involuntary petition in bankruptcy, whose attorneys of record in these proceedings are Hutchins & Wheeler, Esqs., 511 Sears Building, Boston, and that a transcript of the record, proceedings and documents, duly authenticated, be sent to the United States Court of Appeals for the First Circuit under the rules of such court in such cases made and provided.

Teresa (her X mark) Marotta.

Subscribed and sworn to before me this thirteenth day of July, A. D. 1931. George I. Cohen, Notary Public.

[fol. 47] Appeal allowed July 13, 1931.
James A. Lowell, United States District Judge.

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IN UNITED STATES DISTRICT COURT

ASSIGNMENT OF ERRORS—Filed July 13, 1931

Now comes Teresa Marotta and files the following assignment of errors on appeal from the order of this court dated June 24, 1931, adjudicating said Teresa Marotta bankrupt.

1. That the report of the special master did not warrant the entry of said order.

2. That on the special master's report the appellant was entitled to a decree dismissing the petition.

3. That the allegations in the petition that the American Surety Company was a creditor at the time the petition was filed was not sustained.

4. That the allegation in the petition that the American Surety Company was a creditor at the time of the commission of the alleged act of bankruptcy was not sustained.

5. That the court had no jurisdiction to enter an order adjudicating the appellant a bankrupt where a single creditor was the petitioner.

6. That the court in its discretion should dismiss these bankruptcy proceedings where there was a single creditor, namely the petitioner in the entire proceedings.

7. That the court as a matter of law should dismiss the petition where there was but a single creditor, namely the petitioner, at the time of the commission of the act of bankruptcy.

8. That the court should dismiss the proceedings when there was but a single creditor at the time the petition was

filed against the alleged bankrupt, namely the American Surety Company, the petitioner.

9. That the court should dismiss the petition where there was but a single creditor at the time of the commission of the act of bankruptcy, and upon the date when the petition [fol. 48] was filed against the alleged bankrupt, namely the American Surety Company.

10. That the finding of the special master that there was a contract between the American Surety Company, petitioner, and Teresa Marotta, the respondent, is not warranted under the law.

11. That the court erred in sustaining the special master's ruling that there was a contract between the petitioner and the respondent.

12. That the court erred in sustaining the special master's ruling that there was no fraud perpetrated by the petitioner, the American Surety Company, on the respondent Teresa Marotta.

13. That the special master found that Exhibit 1, an instrument purporting to be a fireworks bond, in which bond Mario Mogliani was principal and the American Surety Company was surety, was not a bond, because it was not sealed by the principal; he also found that "if as a matter of law the issue could be raised by the respondent Teresa Marotta in these proceedings, it would seem to follow that the petitioner is not a creditor nor entitled to bring this petition" that the court erred in refusing to sustain the special master on this point and dismissing the petition.

14. That the court erred in ruling that this petition could be maintained by the single petitioning creditor who had on April 9, 1930 filed a bill in equity in the Suffolk Superior Court, Commonwealth of Massachusetts, against the same respondent Teresa Marotta and others, complaining that the conveyances and mortgages described in finding 28 above mentioned should be set aside as fraud.

15. That the court erred in ruling that this petition could be maintained by the single petitioning creditor who had on May 15, 1930 filed a second suit, in which a tem-

porary injunction was issued on May 22, 1930, and in which notice of suit was filed in the Registry of Deeds for Suffolk County, which suit was and is still pending and has not been tried.

16. That the American Surety Company, the petitioning [fol. 49] creditor, having filed two bills in equity prior to the time of the filing of the involuntary petition in bankruptcy in which a temporary injunction was issued, and notice of the bill was filed in the Registry of Deeds, which suit was pending at the time the said involuntary petition was filed, was in legal effect an attachment, and that the American Surety Company was in position of an attaching creditor who has filed an involuntary petition, and that there was error in the court's ruling to the contrary.

17. An attaching creditor who has not released his attachment and who is the sole creditor in the petition and in the entire case cannot file an involuntary petition which should be sustained by the court.

18. That there was no evidence in the case that the bond issued by the American Surety Company and on which bond the appellant Teresa Marotta was indemnitor, was ever delivered to the Commonwealth of Massachusetts before the happening of the fireworks accident.

19. That the finding of the master "this surety bond of which a photostatic copy (Exhibit 1) is attached to this report and together with Exhibit 6 and Exhibit 7 is made part thereof, was subsequently filed with th Commonwealth and approved by the State fire marshal and receiver general some time before September 6, 1927," was not justified, as there was no evidence in the record to sustain this finding of fact, and there was no testimony upon which this finding of fact can be based.

20. There was error in the master's finding and in the court sustaining him, that there was a fraudulent conveyance which constituted an act of bankruptcy.

21. The bond upon which the American Surety Company was surety, and one Mogliani was principal, not having been sealed by the principal, there was a failure of consideration because the existence of a legal bond was a pre-requisite to liability on the part of Teresa Marotta,

and the failure of the court so to rule is assigned as cause for error.

22. The failure of the court to rule that there was no [fols. 50 & 51] evidence that the said Teresa Marotta transferred and conveyed the real estate in question with intent to hinder, delay or defraud her creditors, was error.

23. The court erred in refusing to rule that there was no act of bankruptcy because of the state of mind of the said Teresa Marotta, as there was no evidence that she knew of the existence of the indemnity agreement until April, 1930, when she was served with a subpœna in the equity proceedings.

24. The court erred in refusing to rule that there was an oral trust declared between husband and wife, the Marottas, and that subsequent conveyance from the wife to the husband was not a fraudulent conveyance.

25. The court erred in refusing to rule that the petitioner was not a creditor at the time of the alleged act of bankruptcy, March 8, 1930.

26. The court erred in refusing to rule that the American Surety Company had a provable claim of five hundred dollars ($500) or more, at the time of the alleged act of bankruptcy.

27. The court erred in ruling and sustaining the master's ruling that the contingency was to be considered as of the time of the filing of the petition and not as of the time of the act of bankruptcy.

28. That the decree is erroneous in law.

By Her Attorneys, George I. Cohen, Joseph Santosuosso.

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Bond on appeal for $250.00, approved and filed July 13, 1931, omitted in printing.

[fol. 52] IN UNITED STATES DISTRICT COURT

**Narrative Statement of Evidence**—Filed September 17, 1931; approved October 29, 1931

The following is all the material testimony before Daniel W. Lincoln, special master:

CYNTHIA W. AREY, called by the petitioner and being duly sworn, testified that she was connected with the office of the treasurer and receiver-general of the Commonwealth of Massachusetts; that she had with her in court the original bond which is on file with the treasurer and receiver-general of the Commonwealth; that it was filed in April, 1927; that she has no record of the date it was filed but that she goes by the date on the bond and it was presumably filed on the eighteenth day of April for an exhibition the 19th of April; that she acknowledged it to the State fire marshal and sent a certificate to the principal; that is what she did in this case; that she telephoned the State fire marshall and they could not find that they had kept the certificate, so she has not got the date and so she goes by the date on the bond entirely; that she has no other record than the date of the bond as to the date of the filing; that she has made a search for it and tried to find it but has no record because they did not write them a letter of acknowledgment in this case; that in most any other bond they do, but in the fireworks they have printed certificates and they sent a printed certificate to the principal and also one to the State fire marshal; that she telephoned the State fire marshal's office and they did not have a copy of the certificate in their files; that they found a little correspondence that was kept but nothing to show what date it was actually filed.

The witness produced a photostatic copy of the original bond which was introduced in evidence and marked "Exhibit 1." It was agreed that this photostatic copy was similar to the original bond except that there is a seal of the American Surety Company of New York on the original bond and on the photostatic copy the seal did not show clearly. Counsel for the respondent objected to the introduction of the bond in evidence as it did not have any [fol. 53] seal or wafer attached to it opposite the name of

the principal. The master admitted the bond and saved the respondent's rights as to its admission.

Witness continued: That the bond she produced was taken from the official files of the treasurer and receiver general of the Commonwealth. Later in the hearing the witness was recalled and testified that she had made a further search as to whether there was any record in her office of the treasurer and receiver-general of the Commonwealth of Massachusetts, but there is no record whatsoever; that she called at the State fire marshal's office yesterday and he said they had nothing in their files but had evidently destroyed the certificate sent to them and that she personally has no material from which she can place any more closely the date on which it was filed.

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Raymond Buss, called by the petitioner and being duly sworn, testified that he was resident agent and manager of the American Surety Company of New York for the State of Rhode Island; that he authorized the Boston office to execute the bond inasmuch as he had no authority to execute bonds in the State of Massachusetts, which they did and furnished him with a bond form and the remainder of the bond was filled out at his Providence office, signed there by Mr. Mogliani; that he received a bond form on April 18, 1927; that the bond was signed by Mr. Mogliani, the principal, in Providence; that at the time he received Exhibit 1 there was no typewriting on it, the bond was in blank, signed by the officials of the Boston office, and it had the corporate seal indented; that the officials of the Boston office to whom he referred were T. J. Gargan and W. W. Whitley, at least it was Mr. Gargan and Mr. Whitley; that at the Providence office when Mr. Mogliani called for the bond it was filled in, the inserts were filled in properly as they now appear; that it was signed by Mr. Mogliani, doing business as the Centredale Fireworks Company, and three witnesses, clerks in Mr. Buss' office, witnessed the signature [fol. 54] of Mr. Mogliani; that he took Mr. Mogliani's acknowledgment as principal as notary public; that Mogliani acknowledged it in his presence; that he immediately

gave the bond to Mogliani, who seemed to be in a hurry to have it filed here in Boston.

That prior to the time he had requested the Boston office to execute the bond he had talked with Mr. Mogliani and another Italian whose name he did not remember, who spoke better English than Mogliani; that the limit of the bonds which he in the course of his duties in fact executed and delivered as to fireworks bonds is $15,000; that the business of the American Surety Company of which he is manager is the execution, writing and execution of surety and fidelity bonds and other lines of casualty insurance at the present time; that in 1927 it was the issuance and execution of surety and fidelity bonds; that there is no one superior to him in the Providence office; that the office covers the entire State of Rhode Island.

That within the limits which he has described he was the one who decided whether a given bond should or should not be delivered, issued and delivered; that when this particular bond was delivered to Mogliani it was our intention that the Surety Company should be bound by it in the condition which it then was.

[This testimony as to intention was objected to by the respondent and exceptions duly noted.]

"Mr. Sampson: Was there anything said between you and Mr. Mogliani as to the purpose for which he was taking that bond when you delivered it to him or what he was going to do with it?

Mr. Cohen: That is objected to by the respondent.

Referee: What is the specific ground?

Mr. Cohen: Conversations between this witness and the principal on the bond not in the presence of the respondent here.

Mr. Sampson: Some conversations of that sort are admissible. I mean they prove knowledge. Of course I am trying to show that he knew it was delivered for the purpose of being delivered to the treasurer and receiver general or being filed; it went out in his hands in that condition for that purpose to his knowledge.

[fol. 55] Referee: I will admit it over objections and will save an exception.

Witness: Mr. Mogliani told me he was going to file it immediately at the State House here in Boston."

That he received a letter purporting to be signed by T. J. Gargan dated April 16, 1927 at the Providence office on April 18, 1927; that the bond, a copy of which was put in evidence as Exhibit 1, was contained with that letter.

[This letter was marked for identification.]

That he wrote on March 15, 1928, a letter addressed to Mrs. Teresa Marotta, 490 Pleasant Street, Winthrop, marked "Exhibit 3"; that on top of Exhibit 3 there is a number—693033-B. That every bond carries with it a number for the convenience of the branch office and home office files. That he subsequently received a letter which purports to be signed by Arcangelo Marotta and Teresa Marotta which bears the same number, marked "Exhibit 4". That he made a reply to this letter, Exhibit 4, and identifies the carbon copy of the letter which he wrote in reply, Exhibit 5; that he did not get any reply at all to that letter, Exhibit 5.

The witness testified that he received a document, an application for bond and contract of indemnity, Exhibit 6, before he issued the bond; that he had in his possession before he delivered the bond another document purporting to be signed by Teresa Marotta, marked "Exhibit 7".

"Mr. Sampson: For the sake of the record I will describe it with two words which appear at the top as a 'Financial Statement'."

Witness continues: That in delivering this bond to Mr. Mogliani for the purposes he described he relied on the contents of this document.

[This was objected to by counsel for the respondent and an exception saved to its admission.]

That he would not have delivered the bond if it had not been for this financial statement.

[fol. 56] [This was also objected to by counsel for the respondent and an exception saved to its admission.]

That in consideration for executing the bond his company received a premium of $75.

On cross-examination the witness Mr. Buss testified that in the last 5, 10 or 15 years thousands of bonds have passed

through his hands; that he has had contracts of indemnity as well; that indemnitors do not always sign those papers in his office, but sign them anywhere; that he observed that the signature on the i-demnity contract of Teresa Marotta, respondent in the present case, was by mark; that he does not always insist on an acknowledgment by a notary public whether or not it is signed by mark or by full signature; that the indemnity part is complete without the acknowledgment; that he would accept an indemnity agreement without an acknowledgment if it was signed in his presence.

That he assumed that the indemnity contract was explained to Mrs. Marotta and the basis of his assumption was that the principal and the friend of his who came to the office said they could get me a guarantor or indemnitor worth $100,000, and the assumption is on my part that, whether a person can sign their name or can't sign their name, they are going to ask about what they are signing before they sign it.

That he thought it was a good practice to accept that form of a signature on a contract of indemnity for the fireworks bond he got in the present case, provided it was acknowledged before a notary public; that the acknowledgment would not help her to understand the nature of the instrument.

In answer to a question as to what he did to ascertain whether or not Mrs. Marotta knew the contents of the instrument, the indemnity agreement (before he accepted it and wrote the bond), the witness responded: "I did not do anything."

On redirect examination the witness testified that the indemnity agreement was signed by Mr. Mogliani the principal at Providence in his office on April 18, 1927, and he did not take his acknowledgment under those circumstances.

[fol. 57] On recross-examination the witness testified that Mr. Mogliani brought the document to him; that he accepted the signature as that of Teresa Marotta; that he took Mogliani's word for it with that of the notary public; that the signature was also amplified by the financial statement, which set out that there was a great deal of property there owned by the respondent; that apparently Mr. Good

the notary public had taken the figures and again witnessed the signature; that he did not write a letter to the respondent at once to verify the transaction, and did not think that was necessary.

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Beatrice Ricci, called by the petitioner and being duly sworn, testified that on the 26th of September, 1927, in Everett, Massachusetts, she was at a fireworks exhibition and was injured; that there were 3,000 or 4,000 people present; that no admission was charged; that she had no special invitation to attend; that the exhibition was held in a field off Kelvin Street; that subsequently she brought a suit against Mario Mogliani for the injury she received, by Attorney Oliver B. DiCecca; that she was injured in the fireworks exhibition by a bomb; that the bomb injured her was set off by the people giving the fireworks exhibition; that she does not know Mr. Marotta but identified a man who stood up in the courtroom as one who was present at the trial of her case.

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William J. Good, being duly sworn, testified that he is a lawyer, a member of the Boston Bar and that Teresa Marotta made her mark on Exhibit 6 at his office, 68 Devonshire Street, Boston, Massachusetts; that the words "Teresa Marotta" and "her mark" were written by him immediately prior to the time when she made her mark, that he thinks Mr. Natale for whom he has done business before was present at the time; that the instrument was acknowledged before him as notary public on April 15, 1927.

[The witness identified Archangelo Marotta and Teresa Marotta, who stood in the courtroom when their names were called, as the persons who were present in his office [fol. 58] on that date and identified Mrs. Marotta as the person who made her mark on Exhibit 6.]

That he is not counsel for the American Surety Company of New York in any way; that Mrs. Marotta signed a financial statement, Exhibit 7, at the same time; that he wrote out the figures and the handwriting in Exhibit 7;

that the only words on Exhibit 6 which are in his handwriting are the words "William J. Good to: Teresa Marotta; her mark; Massachusetts; Suffolk, 15, April 27, Teresa Marotta," and his signature and a notation "Notary Public."

He thinks it was Mr. Natale who came to him and wanted him to make out papers that would help him to get a bond and that he thinks that Natale had with him at the time Mr. and Mrs. Marotta; that there was conversation at the time and as a result these papers (Exhibits 6 and 7) were made out.

That he obtained the information which is contained in the financial statement from Mr. and Mrs. Marotta; that he is quite sure that Mr. Marotta participated in the conversation; that he did not know about any of these properties that were described in the financial statement at the time except what he was told.

That he had never done any business for either Mr. or Mrs. Marotta and they were strangers to him; that without being able to state definitely which one of those two made the statement, the facts that were written down in his handwriting were stated to him by either Mr. or Mrs. Marotta and that he put down as accurately as he could what they told him.

That he does not remember whether he made any statement to Mrs. Marotta as to the nature of the agreement which she was signing or what the effect of it was; that Mr. Haines, whose name is in the document, is an office associate of his; that he did not receive directly or indirectly any compensation from the American Surety Company of New York in reference to this application; that he was not in any way employed by them in reference to it.

On cross-examination Mr. Good testified that Mr. Mog-
[fol. 59] liani, the principal on the bond, was not in his place; that he does not recognize the name; that he doesn't know whether Mogliani's signature was filled in when Mrs. Marotta signed; that he took her acknowledgment; that he does not know whether the conversation with the Marottas was in English or Italian; that it was probably a combination of both; that he does not know whether he said to Mrs. Marotta to hold up her hand as the acknowledgment was being taken; that he asked her if she acknowledged this to be her free act and deed.

That he has no recollection of the happenings at that time excepting as he has it as a matter of record; that in answer to the question as to whether he ought to explain to the person when she signed an instrument to be acknowledged by him he said: "Not necessarily. Some people are able to understand perfectly what is said without being able to read and write;" that he doesn't know whether he explained to her the nature of the acknowledgment; that the whole matter of what the financial statement was was discussed by the parties with Mr. Natale and himself; that he doesn't know whether Mr. Marotta or Natale brought the papers, that he doesn't know how Mr. and Mrs. Marotta came.

That if a person knows the contents of a paper his duty as an attorney and notary public are all satisfied in taking their acknowledgment; that the person did know the contents of the paper here; that the person came to him with the idea of putting up certain security for the purpose of obtaining a bond; that there was nothing unusual called to his attention when he witnessed the signature and took the acknowledgment, and as far as he was concerned that Mrs. Marotta took the pen after someone had written her name, made a cross, and he signed his name and Mr. Haines, his associate, signed his name as witnesses to her mark.

In answer to the question as to whether there was any special reason why two witnesses were needed for one mark, the answer was: "Yes. For safety, so that there would be [fol. 60] no question at all about the identity of the person if anything should come up afterwards."

That a part of the Exhibit 6 was not in the witness' hand-writing and part of it was; that the paper was dated April 18, 1927, and the acknowledgment was taken April 15, 1927.

In answer to the question as to whether it was a fair inference that there was nothing made out on the front of the paper when it was signed, the witness answered: "It may not be, but that is not for me to say."

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Raymond Buss, recalled, testified, with reference to Exhibit 6, that the printed blank was furnished by the home

office of the company; that part of it was made out in his own handwriting referring to the lower half of the page; that the "15,000, $75 for six months" is in his own handwriting; that he filled in whatever appears on the first page in his own handwriting except "Prov., R. I. April 18, '27"; that was before the date it was signed; that at the time he filled in the first page there were no signatures on page 3; that the handwriting on the second page is all his; that on the third page the handwriting which is his is his own name "Raymond Buss" as witness to Mogliani's signature, which was written on April 18, 1927; that the handwriting on the two lines on the first page showing the place and date and the handwriting on the third page, the date, April 18, 1927, is the writing of the reporting clerk in Mr. Buss' office; that these things were filled out on April 18th, the date that Mr. Mogliani signed the application.

On cross-examination he testified that he has had the same duties since 1918 and has been manager of the Providence office since 1920; that he wrote on the Exhibit 6 document, at two different times; once when he made out the statement written by him on the first page, and the second time when he received it back after the signatures; that the instrument was sealed before it left his office, when he turned it over to Mr. Mogliani.

That the application left his office, two, three or four days [fol. 61] before it came back; that it is necessary that the principal sign the application; that it is optional whether the principal's signature is acknowledged or witnessed; that Mr. Mogliani paid the premium of $75; that in case the principal failed to pay the premium the indemnitor would be responsible; that the premium should be paid as long as the bond is in force; that $75 was the premium for six months; that the respondent undoubtedly owes more than $150 for premiums; that the witness made out the first page, as he would never have had an application go out in blank; that he saw that the fireworks bond, Exhibit 1, had no seal against the principal's name and that it was not an oversight that the seal was left off.

That he delivered the bond deliberately without a seal on it as it says "seal" in brackets opposite the signature; that if it has a bracket saying "L. S." or "Seal" that is

a perfectly legal seal without the necessity of a sticker; that there is an "L. S." on the application; that he almost always puts a seal on an application in order to show where to sign.

On redirect examination the witness testified that it is very common in his business to issue a bond with a scroll or "L. S." opposite the name of the principal rather than put on a sticker; that as he understood the situation, when he delivered the bond to Mr. Mogliani there was nothing further needed to make it complete.

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DANIEL W. MANNING, called by the petitioner and being duly sworn, testified that he is a police officer in the City of Everett; that he was present at a display of fireworks on the twenty-sixth day of September, 1927, in Everett, and observed an accident at the exhibition, and saw the girl Beatrice Ricci injured, and that the accident was caused by contact of two bombs striking in the air, one going in one direction and one in the other, and one of the bombs struck the little girl; that there were about 5,000 people present; that it was a public exhibition; that no admission was charged and that it had been advertised for three days.

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[fol. 62] ANTONIO NATALE, of Centredale, Rhode Island, called by the petitioner and being duly sworn, testified he was in the fireworks business, working for Mario Mogliani, who was in the fireworks business; that fireworks were sent from the factory to Everett in September, 1927 for an exhibition and he sent some men to discharge them; that he has known William J. Good three or four years; that he knew Mr. Marotta five or six years and knew Mrs. Marotta about the same time; that he had had business dealings with Mr. and Mrs. Marotta prior to 1927; that he saw Mrs. Marotta make the mark that is on Exhibit 6 and Exhibit 7; that before the mark was made and a few days before going to Mr. Good's office he talked with Mr. Marotta about going indemnity on a fireworks bond; that

he paid Mr. Marotta $800 in two payments for the bond after the papers were signed in Mr. Good's office; that the first payment was made two or three weeks after they were in Mr. Good's office; that Mrs. Marotta had gone on a fireworks bond for him before, five or six years ago when he was doing business as the Pearl Fireworks.

That he thinks the Metropolitan Casualty Company was the surety on that bond; that Mrs. Marotta signed some papers in connection with the bond to the Metropolitan Casualty Company; that she and her husband signed; that after the Exhibits 6 and 7 were signed he gave them to Mr. Mogliani; that the witness reads English a little; that he does not know whether Mrs. Marotta speaks English; that as to the items of real estate on Exhibit 7, that only Mr. Marotta said anything in Mr. Good's office that day as to what the value was; that Mr. Marotta made the statements of the land.

That he talked with Mr. and Mrs. Marotta that day and "asked them if they would go on the bond for the fireworks for this place", and they said yes, and he told them about going to Mr. Good's office to have the papers signed; that nothing was said that day as to how much he was going to pay them for going on the bond; that the witness had business with Mr. Good before then and was working for Mogliani at the time; that he had no talk with the Marottas [fol. 63] as to who was running the business. That he had a talk with them as to who was going to give the bond to the State of Massachusetts.

"Mr. Sampson: Who did you tell them?

Witness: The State of Massachusetts.

Mr. Sampson: Who did you tell them was going to give the bond?

Witness: Mr. Marotta.

Mr. Sampson: Did you tell them who they were going to give the bond to?

Witness: I don't understand."

That he told this to Mr. Marotta; that they all went, the witness and Mr. and Mrs. Marotta, to Mr. Good's office; that he and Mr. and Mrs. Marotta talked in Good's office that day; that Mr. Good asked some questions, asked what real estate they had, property, money; that he asked Mr.

Marotta questions, and in answer to the question as to whether he said anything about what Mrs. Marotta had, the answer was "he was talking with Mr. Marotta"; that Mr. Good asked Mr. Marotta what real estate Mrs. Marotta had; that Mr. Marotta was telling what real estate Mrs. Marotta had; that Mr. and Mrs. Marotta talked together in Good's office; that they talked in Italian; that he is an Italian and speaks Italian; that he does not remember what Mr. and Mrs. Marotta said between each other; that he doesn't remember whether Mr. Good said anything else about the papers or not.

On cross-examination the witness testified he did not know what this case was all about and when asked as to what Exhibit 6 was, the indemnity agreement, he said he thought that was the bond for the fireworks; that the Marottas were friends of his and he was a friend of theirs; that he didn't have Mr. Mogliani in Mr. Good's office when the papers were signed, and that the Marottas knew Mogliani; that he didn't tell the Marottas this was a bond for Mogliani; that he didn't tell them it was a bond for himself; that he told them it was a bond for fireworks; that [fol. 64] he didn't speak to them about an attachment bond; that he does not know what an attachment bond is.

In answer to the question as to whether he told them they were going bond for $15,000 for Mr. Mogliani, he said he didn't mention Mr. Mogliani.

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Oliver B. DiCecca, called by petitioner and being duly sworn, testified that he was an attorney and that he brought the action for Beatrice Ricci against Mogliani in the Superior Court in Middlesex County, which was entered, writ dated April 12, 1928, and testified the authenticated copy of a record was the suit which was brought by him, said record being Exhibit 8.

The witness testified that he made a demand against Mr. Mogliani to collect the execution and put it in an officer's hands for that purpose and did not succeed in collecting it from him, and made demand against the American Surety Company and brought suit, brought on behalf of Beatrice Ricci, against the American Surety Company on

the bond put in evidence in this case, in the Municipal Court of the City of Boston, which is Exhibit 9.

That the judgment recovered in this action was the same amount as was due on the execution; that the Surety Company paid the sum of $6,653.78 on April 18, 1930, which was the date of the writ, after the writ was brought; that subsequent to the payment judgment was entered by agreement and execution returned to court satisfied in the case in the Municipal Court; that at the trial of the Ricci case Mr. Marotta was in the court room practically all the time we tried the case; that a man named Bennett from the office of Dallinger & Stearns, was the lawyer defending the action; that Frank Fralli, a lawyer, appeared with Mr. Bennett at the motion for new trial but just listened in; that the witness talked with Mr. Fralli about the Ricci case three times.

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Frank M. Zottoli, called by the petitioner and being duly sworn, testified he is an attorney, that he has known [fol. 65] Mr. Marotta for about thirty years, and the last time he saw him was in relation to a real estate transfer; that he made out some papers; that he took the acknowledgment on two deeds, one from Pellegrino Muollo to Arcangelo Marotta, trustee (Exhibit 10), recorded with Suffolk Deeds, Book 5171, page 266, and dated March 18, 1930, the other a declaration of trust dated March 15, 1930; that he dictated these instruments and also Exhibits 10, 11, 12, 13 and 14; that the declaration of trust was drawn on the day it is dated, March 15, 1930; that no other papers were drawn and signed which are not in evidence; that he notes that the declaration of trust refers to Winthrop property and that it is dated March 15, 1930, and all the others are dated March 18, 1930.

That he would not say that all the papers were dictated to be a part of one transaction; that he would say there was no deed dated on or prior to March 15 to Arcangelo Marotta of the Pleasant Street property that has not been recorded; that either before or at the time the declaration of trust was dictated or before the declaration of trust was actually recorded he contemplated that this deed would be made to the Winthrop property; that he keeps no diaries

or memoranda which would show whom he interviewed on a particular day.

That he does a strictly cash business and has no books of account for services; that Mr. Marotta saw him first with reference to the matter which led up to the dictating of these papers; that there was no one with Marotta at the time; that he doesn't know how long before the 15th of March it was that he saw Marotta; that it would not take long to dictate the various papers; that the form of instrument used in the declaration was a standard form he has used for the last fifteen or twenty years, in fifty or a hundred cases; that he did not dictate all the papers at one sitting, those that bear a later date would be dictated later; that he would have had the papers prepared for the 18th; that they may have been prepared before with an anticipating date; that the declaration of trust was dictated first; that it is not clear in his mind whether he went to the registry or had the deeds or old mortgages [fol. 66] that described the properties before he dictated these documents.

That he saw Mr. Grella and Mr. Dello Russo in connection with the matter on, he thinks, more than one occasion—it may have been just once; that he saw them when the deeds were executed on the 18th and he thinks another time when they settled the terms, but could not say for sure that they didn't settle the terms when the documents were drawn; that he saw Mrs. Marotta once when she signed the deed; that all the deeds were signed in his presence; that the instruments were acknowledged on the day that they were dated; that the instruments were executed the day they were dated; that every one of the deeds were signed in his presence; that they were acknowledged the day they were signed if the date of the instrument is the same as the date of the acknowledgment; that he saw Muollo he thinks twice; that he knew him as a young man.

That he had a conversation with Muollo before he dictated the deed from Mrs. Marotta to Muollo; that he did not examine the title to the property or give any opinion on the title to the mortgagees; that he was acting for the mortgagees to see that the documents were drawn prop-

erly; that he had seen the two mortgagees before he had dictated the mortgages.

That he had seen only Arcangelo Marotta before he dictated the declaration of trust; that he couldn't say whether he had seen any of these people on March 15 when Arcangelo signed the declaration of trust; that Marotta came to see him first, then Muollo; that he is not certain but he thinks Muollo came alone the first time, the others came with Marotta and Muollo as a group; that he had not known Dello Russo before; that he had seen Grella before but would not say that he knew him; that he was acting for all of them in this transaction; that he doesn't know who paid the bill, he said so much for this and so much for that and the money came and he can't say just who paid; that he thinks the bulk of it was paid by Marotta; that he doesn't remember the situation as to whether Muollo paid him anything and he doesn't remember that [fol. 67] the mortgagees paid him anything; that Mrs. Marotta did not pay him anything, that Mr. Marotta paid whatever her end was; that no money or checks were passed in his presence and the papers were signed in his office.

That he recorded the papers; that mortgage notes were executed in his office and signed by Muollo; that he does not know how Mr. Marotta happened to come to him in the first instance; that he did not know at the time that a lawyer named Fralli was acting for Marotta and his wife in connection with this case; that he learned something in relation to that later; that he did not know of the suit of Ricci v. Mogliani at the time the papers were drawn nor did he have any information that Mrs. Marotta was on an indemnity agreement to the American Surety Company; that the witness had no information as to claims that were impending.

On cross-examination Mr. Cohen asked: "Mr. Zottoli, isn't this the situation of this transaction—that Mr. Marotta wanted to declare a trust and conferred with you about that situation?" The witness objected to answering and claimed privilege on the ground that he acted for Arcangelo Marotta and this was a proceeding against Teresa Marotta and Arcangelo Marotta had not waived the privilege.

RAYMOND BUSS, recalled by the petitioner, testified that he had made a search for written authority under seal of the American Surety Company of New York which he had in the year 1927, and produced a document which was introduced in evidence as "Exhibit 15"; that he is familiar with the signature of I. C. Clark and the signature on Exhibit 15 is that of I. C. Clark; that he knows that I. C. Clark was assistant secretary of the American Surety Company in 1927; that the premium of $75 on this bond was collected and was deposited in the bank account of the company in Providence to the credit of the American Surety Company of New York; that the American Surety Company of New York was advised of the deposit the same day; that was the last he has heard about it and that only [fol. 68] the home office of the American Surety Company had authority to draw on that bank account.

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THOMAS J. GARGAN, called by the petitioner and being duly sworn, testified that he was the resident vice president of the American Surety Company; that his office is in Boston; that he is the T. J. Gargan described in Exhibit 15 and signed the bond which is Exhibit 1 in the case, and also familiar with Mr. W. I. Whitley, resident assistant secretary, who witnessed the bond; that Mr. Whitley is resident assistant secretary and is the Mr. Whitley described in the vote Exhibit 15; that the name T. J. Gargan in the original bond is in his handwriting; that he is familiar with Mr. Whitley's handwriting and the words on the bond "Attest W. I. Whitley, Resident Assistant Secretary" are in Mr. Whitley's handwriting, and he wrote the letter marked "Exhibit 2"; that on April 16, 1927, he and Mr. Whitley signed the bond and sealed it and sent it to Mr. Buss by mail; that the letter Exhibit 2 was the letter which transmitted the bond; that Mr. Philbrick is manager of the Boston office of the American Surety Company; that the seal on the original bond is that of the American Surety Company, and that he affixed it, and it is part of his duty to affix seals.

That during the year 1927 he signed probably a thousand or more bonds for the American Surety Company of New

**York, and that Mr. Whitley probably attested the same number; that the premiums received on the bonds are deposited in banks in Boston to the credit of the American Surety Company, and that the home office of the American Surety Company has authority to draw on the bank accounts; that copies of bonds in the sum of over $25,000 are sent to the New York office; that probably fifty or sixty such bonds were sent in the year 1926 and 1927; that the same would be true as to Mr. Whitley; that he has an annual license issued by the State of Massachusetts as agent of the American Surety Company of New York, issued on July 1, 1927, which shows that it is a renewal; [fol. 69] that he had a similar license the preceding year and has made a search for it and could not find it, and that it must have been destroyed.**

[The license was introduced in evidence as Exhibit 16.]

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William I. Whitley, called by the petitioner and being duly sworn, testified that he is resident assistant secretary of the American Surety Company and has been for possibly ten years, and was resident assistant secretary in the years 1926 and 1927, and is the W. I. Whitley named on page 3 of Exhibit 15; that the signature "W. I. Whitley" on Exhibit 1 is his signature; that he is familiar with the signature of T. J. Gargan, and the signature on Exhibit 1 is that of T. J. Gargan, and that the seal on Exhibit 1 is the seal of the American Surety Company, and that the seal of the Surety Company is almost undiscernible on the photostatic copy.

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Oliver B. DiCecca, recalled by the petitioner, testified that he first saw the bond Exhibit 1 in the office of the treasurer and receiver general some time between September 26, 1927, and the fifth day of October, 1927, that he refreshes his recollection as to this by a copy of a letter addressed to the Centredale Fireworks Company, Providence, Rhode Island, October 5, 1927.

PELLEGRINO MUOLLO, called by the petitioner and being duly sworn, testified he is a member of the fire department of the City of Boston; that he has known Arcangelo Marotta for about 38 years, is a friend of his; that Marotta's wife is a sister of his deceased wife; that Mr. Marotta came to him and asked him if he would help him to go to Mr. Zottoli's office to sign some papers; that he went to Mr. Zottoli's office with Mr. Marotta; that he signed some papers and didn't read them; that he knows what a mortgage note is; that he understood that a mortgage note means that you owe money to someone and that there is a mortgage to secure it; that he gave no money and didn't owe any money to Mr. Grella or Mr. Dello Russo and doesn't remember that he ever borrowed any money from either of them.

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[fol. 70] NICOLA DELLO RUSSO, called by the petitioner and being duly sworn, testified that he has known Mr. Marotta pretty nearly all his life; that they are friends; that he has a place of business at No. 3 Lewis Street about 100 feet away from Marotta's place of business; that Marotta asked him if he couldn't do him a favor to his wife and himself and then he told me about the mortgage and Marotta told him "you don't have to pay out any money, it won't cost you anything"; that he went to Mr. Zottoli's office and signed papers, signed the note; that he did not get any money or give any money; that he has no note of Muollo's that Muollo doesn't owe him any money and never did and Arcangelo doesn't owe him any money and he doesn't owe Arcangelo any; that Mrs. Marotta did not owe him any money nor he owe her any.

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MARCIANO GRELLA, called by the petitioner and being duly sworn, testified his wife is a sister to Mrs. Marotta; that Arcangelo Marotta has five children; that they are all big but he doesn't know the ages; that he went to Mr. Zottoli's office about some papers, Archangelo Marotta asked him to come; that it was a mortgage transaction; that Arcangelo Marotta told him he didn't have to pay any money; that he

doesn't remember who was at Zottoli's office; that he went to Zottoli's office; that he didn't pay any money; that he didn't get any money; that he knows Muollo and has known him for 20 years; that Muollo doesn't owe him anything and he doesn't owe Muollo anything; that he hasn't any mortgage note of Muollo's; that he knows he has a mortgage on real estate of Arcangelo Marotta; that he doesn't know what property the mortgage is on but thinks it is the Winthrop property; that he has never discharged the mortgage, and on being asked if he is ready to discharge it if Marotta asks him, he stated that he doesn't understand; that the only thing he knows is that he signed a piece of paper.

"Mr. Sampson: Mr. Arcangelo Marotta, if you have any paper here signed by this witness I will ask you to produce it.

Mr. Marotta: No, sir; I have not any."

[fol. 71] Witness continued: That he thinks it was the Winthrop property but doesn't know anything about the transaction.

Next was introduced in evidence a certified copy of deed from Chester Parker and Ethel W. Parker to Teresa Marotta, Exhibit 17, on Lewis Street property, deed being dated July 10, 1906, then a deed from George L. Clark to Teresa Marotta, being Exhibit 18, which is known as the Fulton Street property, and then a deed of Earley to Marotta on the Winthrop property, dated May 1, 1919, Exhibit 19; next was introduced Exhibit 20. Then the petitioner rested.

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Arcangelo Marotta, called by the respondent and being duly sworn, testified that he lives at 491 Pleasant Street, Winthrop, Mass.; that he is 64 years old, been in the United States 34 years, and in the year 1906 he was a liquor dealer and had a place of business on North Street in Boston, and had been in the liquor business since 1897; that at the present time he was handling near beer, gingerale, Moxie, wholesale; that he conducted from 1897 to about 1918 a retail liquor store; that in 1906 there were two parcels of

real estate purchased, Fulton Street and Lewis Street; that he paid $42,000 for the Fulton Street one and $17,000 for the Lewis Street one; that these figures included mortgages; that he himself paid the money; that his wife did not pay any money at that time; that at the time he took title in 1906 there was a talk between the witness and his wife in Italian at the lawyer's office, and the lawyer was Mr. Sawyer and the broker A. Bernstein and the seller George L. Clark; that Bernstein spoke Italian; that he bought the property and put it in his wife's name and the broker explained it to the lawyer who made out the deeds.

[Counsel for the petitioner objected to the admission of this conversation and an exception was saved to its admission.]

That he said to his wife: "I buy this piece of property and I put it under your name until I want it myself"; that when he bought the second parcel, the Fulton Street parcel, [fol. 72] he had the same talk, the same broker; that he doesn't remember who the lawyer was; that he didn't have any lawyer; that Bernstein and Parker the seller were present at the talk with his wife; that the owner of the property was Chester Parker; that the second parcel was the one he bought from the Clark people and he had the same conversation there between he and his wife and Bernstein; that in 1919 he bought the Winthrop property of James J. Earley of North Dakota; that his lawyer was Arturo DeFilippo and Peter Maher; that Peter Maher was present when they passed papers and a woman that used to deal in real estate in Winthrop and Mrs. Marotta.

That at that time he said to his wife in the lawyer's office: "I buy this piece of property and go to live in it, and also put it under your name, but when I want it you got to turn it over to me", and his wife said "Yes"; that his wife had no money of any kind; that she never had a bank account; that the witness had his bank accounts in the Exchange Trust Company; that he started his bank account in 1910 and had an account with the Exchange Trust Company; that he had no bank account in 1906; all cash no checks; that he had no savings account then, and in 1919 he was banking with the Fourth National Bank; that he had just a checking account; that in 1928 his wife deeded

to him the Lewis Street property, which was the first one purchased; that the building was in poor condition at that time.

That he tore the old building down in 1927 and built a new one; that since 1906 the witness has been collecting the rents, made all the payments on the building, paid the mortgage interest, paid the taxes; that his wife never paid any mortgage interest; that he used to look over the property and take care of it and watched it; that in 1927 he tore down the Clark property and rebuilt it; that it was finished in 1928.

[Exhibit 21 was then offered in evidence, being a deed from Teresa Marotta to Arcangelo Marotta, dated February 23, 1928, known as the Lewis Street property.]

The witness testified that this transfer took place in the [fol. 73] presence of Frank P. Fralli, attorney; that he told his wife at that time he wanted to have the piece of property turned over to him and she said "Yes"; that in 1930 he went to Frank Zottoli's office, the attorney, with his wife and he said to Mr. Zottoli in his wife's presence: "My wife has two pieces of property and I want to have them in my name." His wife heard that and she said "Yes"; that nothing else was said. That there was nothing said about mortgages; that he later saw Mr. Zottoli and spoke to him about mortgages; and he told him he wanted to put on some; that Zottoli said well find the mortgagees and we will do the rest.

That he talked to him about the declaration of trust; that he told him he wanted to be protected; that he told the lawyer he wanted to have the papers changed and that he wanted the mortgages; that he told the lawyer he was putting the mortgages on the property as he might need some money and if he went to the banks and asked them for money they wouldn't give it to him, but if he said, "Here, I give this mortgage", they would lend him money on the mortgage; that about March 18, 1930, his wife and he executed the papers; that he knew Mr. Natale 10 or 12 years; that on an average he had seen Natale every four or five months and that some time in April, 1927 Natale came to his place and asked him if he would give him an attachment bond, and he told him he didn't have any property and said "My wife has the property".

That Natale asked if he wouldn't do him a favor and talk to his wife and see if she would give the bond; that he said the bond was for $1,000; that there was an attachment on his property and he wanted it discharged; that Natale came down to his house in Winthrop the next night and talked to his wife about it and she said "No"; that Natale came to his place the next day and begged him to get his wife to sign the papers, and the witness called up his wife on the telephone and she came to the store, and Natale had left the card for Mr. Good's office, and that his wife came and someone sent an automobile to get him and his wife [fol. 74] and brought them to Mr. Good's office, and when he got there he found Mr. Natale and Mr. Good in the office, and Mr. Natale said: "Well, we got the papers all made out just to sign your name", and Mrs. Marotta said: "I can't sign my name; I don't know how to read or write."

That they talked between them, Mr. Natale and Mr. Good, and then Mr. Good said: "Well, you just touch a pen and make out the mark, that is all." That at that time his wife asked Mr. Natale: "Mr. Natale, what is this?" and he said: "I want this only for $1,000, because they attach my property, and I am going to discharge that attachment"; that conversation was in Italian; that the witness does not know Mr. Mogliana; that his wife does not know him, that he has only seen him once and that was when the case was being tried in East Cambridge, in 1930; that Natale and Mogliani came into his store and that was the only time he saw Mogliani; that his wife has never seen Mogliani.

That there was no talk in Mr. Good's office about a bond for $15,000 and no talk about the fireworks bond or agreement to indemnify; that Mr. Good asked her to raise her hand and she did not understand and Natale told his wife to raise her hand in Italian; that some time after the paper was signed he learned there was an accident in Everett; that he received a letter from the Surety Company and after he received the letter he sent for Natale to come to see him; that Natale came to see him and he had a talk with him; that he didn't say anything to his wife about it; that the next time he heard about the fireworks accident case was when he received a summons in the equity court; that he knew about the trial in East Cambridge because when the case was started Natale came to see him with Mog-

liani, that he had a talk with them and they went over to East Cambridge and watched the trial.

That he didn't tell his wife anything about this; that as far as he knew his wife first knew about the fireworks bond and the contract of indemnity and all this business when [fol. 75] she got the summons in the equity court, Suffolk Superior Court, said summons being dated April 9, 1930, bill of complaint brought by the American Surety Company of New York against Teresa Marotta and others, being case No. 35663 Equity, Exhibit 22, and then another summons, dated May 22, 1930, case No. 35878 Equity, being Exhibit 23, and that on or about April 9, 1930 was the first time his wife knew about the trouble about the accident and the fireworks bond; that when he took a deed in 1928 on the Lewis Street property that he knew about a claim made by a girl, but that Mr. Natale told him the case had been fixed; that he knew in March, 1930; that he went to court before he took the two deeds; that the case had not been fixed; that he received no money from Natale.

On cross-examination he testified that he first learned there had been an accident out in Everett from the Surety Company; that in 1928 his wife deeded him the Lewis Street property and at that time he had heard about the case; that Mr. Natale told him: "We settled that case, we fix that case already"; that he didn't know at that time that his wife was on a fireworks bond; that nobody ever told him the bond was for fireworks; that he talked with Natale about the accident on the fireworks, because he wrote Natale a letter, what he received from the Surety Company; he told Natale when Natale came to see him: "What I received from this company here." "Oh", he said, "that is nothing, that is nothing; I will fix it up, I will fix it up; don't be afraid."

That the witness cannot read English; that he receives his wife's mail; that the witness cannot read Italian or English; that his daughter read a letter which he thinks is Exhibit 3; that he doesn't know of any other letter from the Surety Company at about that time or before; that Exhibit 3 does not sound like the letter he heard read; that he doesn't think he received that letter; that he thinks his counsel produced it yesterday; that he doesn't think that is the letter, because the one that he received, as soon as

the accident happened, just mentioned it and said there is [fol. 76] something happened by fireworks; that he doesn't know how Mr. Cohen got the letter that he produced yesterday.

That the letter Exhibit 4 is on the kind of letter paper he uses; that he can read figures and that the same figures are on top of the letter Exhibit 3 and on top of the letter Exhibit 4; that Exhibit 3 must be the letter, he received that on July 31, 1928; that he answered the letter Exhibit 3, which is Exhibit 4, letter of Arcangelo and Teresa Marotta to Raymond Buss, manager of the American Surety Company; that the letter was written for him by a lawyer in the Tremont Building, that he wrote "P. S." on the letter, "We have signed the said bond on the ten day of April, 1928"; that the letter was read over to him and he knew what was in it.

That Natale had told him that the certificate had to be renewed because the attachment had not been discharged; that the lawyer's name was Cicache; that Natale brought a new paper for him and his wife to sign; that he and his wife went to the office of Cicache and signed the new papers before the letter was written; that his wife did not go to Cicache's office when the letter was written; that he didn't know it was a fireworks bond he signed when he went to Cicache's office.

That in July 1928 he heard nothing more about the accident; that he thought it was settled and the reason why he wrote the letter was that he wanted to have his property clear; that he did not want to be on any bond; that in 1924 his wife with another party went on a bond for Natale but he doesn't know whether it was for fireworks; that it wasn't renewed by his wife in 1925 or 1926; that his wife was on some kind of a bond but he didn't know whether it was for fireworks or for something else; that she went on the bond for a Mr. Angelo Jannini, who is a brother-in-law of his; that she received no pay for it; that she has gone on a bail bond at some time but received no pay for that; that he made no effort after receiving a letter from the American Surety Company August 1, 1928, Exhibit 5, to find out whether the bond had been cancelled or not, that he didn't [fol. 77] do anything about his request to have it cancelled; that he didn't get any word from the Surety Company whether it had been cancelled or not.

That he knows a lawyer named Frank Fralli; that the witness was present at the trial of this case in East Cambridge that Beatrice Ricci brought against Mogliani; that he did not know of the verdict the jury found; that he did not know there was a motion for a new trial in that case; that he did not employ Frank Fralli to do something about that case; that he doesn't know who did; that he didn't have any talk with Frank Fralli about that case; that so far as he knows his wife did not have any talk with Fralli; that if Frank Fralli was over in court in that case he was not acting for him or for his wife so far as he knows; that he employed Frank Fralli at various times; that he had nothing to do for him about the fireworks bond, that Fralli didn't have anything to do for his wife about it; that he or his wife didn't ask Fralli about it.

That he went to the East Cambridge court because Natale came to his place of business just as the case started and told him: "Mr. Marotta, the case has started today, where they try the case of the girl that got hurt in Everett"; and I say: "What is the matter? You told me it has been fixed long ago." "Well," he said, "we can fix, we can fix", so I went there and listened on the case; that when he went to Cambridge he did not know that someone claimed his wife had signed the fireworks bond at all; that he went to East Cambridge because Natale asked him; that when Natale told him he got mad and wanted to give Natale a licking because he had told him that the case had been fixed long ago and he came in and told me that the case started in the afternoon; that he wanted to lick Natale "Because he told me that the paper, what we sign, ain't no fireworks at all, and he told me at that time, when he come in and tell me the case was started."

He understood the case that was started was about the accident in Everett; that he was at East Cambridge a day and a half; that he didn't know he had anything to lose if the case went wrong and he did not know what his wife had [fol. 78] to do with the case except that she signed a paper for an attachment bond; that he found out after he got over to the court that the suit was against Mogliani; that he didn't do anything when he found out the suit was against Mogliani; that he stayed there just the same; that he didn't ask anybody why the suit was against Mogliani;

that Natale was there and he didn't ask him any questions; that he didn't have any lawyer at the time.

That with reference to the papers Exhibits 6 and 7, that Mr. Natale said when he came to Mr. Good's office: "There, Mr. Marotta, is the paper all filled; just to have her sign the paper." I said to Mr. Natale: "You know my wife can't sign her name." Mr. Natale talked with Mr. Good and he said: "Put a cross, that is all."

Regarding Exhibit 7, the details therein of the net annual revenue, mortgages and assessed value were taken up one by one and the witness testified the items were correct, except that the item of assessed value of $38,000 on the Fulton Street property is too big, as it was assessed in 1920 for $38,000, but had been cut down little by little since, and that $50,000 stated in Exhibit 7 is a little too big for the value of the property; that he did not tell Mr. Good the things that were on the paper and his wife did not tell him; that nobody except the witness and his wife knew how much the properties brought in every year.

The witness testified that he doesn't know how long he was in Good's office the day the papers were signed but he doesn't think it was more than ten minutes. [The witness identifies Mr. Vallanti as the man he thinks drove him in an automobile to Mr. Good's office.] That when he got to Mr. Good's office Mr. Natale was there with Mr. Good; that Mr. Natale said: "There is the papers all drawn which you have to sign; your wife has got to sign", and "I saw the paper there full of write" (writing); that he saw both of the papers full of writing; that he didn't say anything to Mr. Good before he saw the papers, and Mrs. Marotta didn't say anything; that Natale while he was [fol. 79] there didn't say anything to Mr. Good about the writing that was on the papers, or about the property.

That he didn't say anything about the bond, that he didn't say anything about it being an attachment bond; that the talk about the attachment bond, the $1,000 bond, was in the store of the witness; that there was nobody present except the witness and Natale when the talk took place about the $1,000 bond; that his wife wasn't there; that Natale came to his house the next day after the witness had told Natale that his wife had refused to go on the $1,000 bond, and Natale spoke to his wife asking if she

couldn't go on the bond for him for $1,000; that nothing was said in Mr. Good's office about the attachment bond because everything was arranged in the store, and all he did in Mr. Good's office was to go there with his wife and his wife just stayed long enough to sign the papers with her mark, and Mr. Good took her acknowledgment on the papers; that is all that he remembers that happened.

That his wife went on a bail bond the previous summer for one DeLuca, who was a brother-in-law of the witness; that she went alone on the bond; that she went on the bond for DeLuca and went on a bail bond, which is a bond to take a man out of jail that has been arrested; that he knew his wife was going on the bail bond before she went on it; that before he went on the bond to Mr. Good's office he didn't go to any Italian lawyer about it, and that Natale nor Mogliani ever went with him to any Italian lawyer; that his wife did not have any money on the 16th of last July and had no other property except this real estate.

That his children are all born in this country, the oldest being 26 and the youngest 15; that his children talk English and Italian at home; that in answer to the question as to whether his wife understands any English, he answered "Very little"; that his wife does not work and lives at home and keeps the house; that the witness is not a voter in Winthrop; that when the papers were made out and signed in Mr. Zottoli's office, he went there two or three times, the first time he went with his wife and had a talk, [fol. 80] and then went there the second time, two or three days later with Pellegrino Muollo, Nicola Dello Russo and Mariano Grella, and they were there about three-quarters of an hour, and all the papers were signed on that day; that he went there three or four days later.

The witness was shown Exhibit 14, declaration of trust, signed by mark of the witness. He testified that nothing was said to him about the declaration of trust in Zottoli's office; that the witness doesn't know what the papers say; that Mr. Zottoli told him it would protect him, his wife and children; that the trust is to "support and maintain the children of the spouses, and the children's children", only as he sees fit to do so; that he did not tell the lawyer what to put in the papers but the lawyer told him; that he told Mr. Zottoli: "Mr. Zottoli, my wife has some property in

her name, now I want her to turn it over to me", and then Mr. Zottoli asked what property and where it was situated, and everything; that Mr. Zottoli said it should be done to protect him and protect his wife and not he.

That it was the first time that he was there that Zottoli talked about protecting; that he doesn't know what Zottoli said he was going to be protected against; that no papers were signed in Mr. Zottoli's office when he was there the first day; that no papers were signed the third time he was there; that the witness knew one of the papers signed was a mortgage for $20,000 and another for $8,000, and didn't know whether the mortgages were to be recorded because the lawyer was to take care of it, and that he knew the land was deeded to him after the mortgages were put on and he knew there would be $28,000 of mortgages on the property when it was deeded to him, and he knew that no money had been paid on those mortgages; that he didn't ask anybody what would happen if one of the mortgagees should die; that no one mentioned the subject to him.

That he knows what a mortgage is and that usually you have to pay the amount of the mortgage to get the property back; that he knows what a discharge of a mortgage is; [fol. 81] that he understands what an assignment of a mortgage is; that Grella and Dello Russo did not give him any discharges of the mortgages, and that the witness did not have any talk with Mr. Zottoli how he was going to get rid of the mortgages; that when he went to Mr. Zottoli he told him the story and did not tell Mr. Zottoli what to do except that he told him about his wife and the property and he wanted her to turn it over to him, and that Mr. Zottoli dictated the rest; that he doesn't know about the mortgages and the deeds; that Mr. Zottoli took care of that; that the witness asked Mr. Grella and Dello Russo to come to the lawyer's; that nobody said what they were there that day for.

On redirect examination Mr. Marotta testified the Clark deed of 1906 and the Earley deed had been in his safe the last 24 years, and he has had possession of them all the time; that the safe is in his store at 251 North Street; that the purpose and object of making out the mortgages to Dello Russo and Grella was that some time he might need money and he would introduce those mortgages to some

bankers and get money on them; that for 24 years he had collected the rents on the Clark and Lewis Street properties; that he gave very few receipts for rent but whenever he gave a receipt to any of the tenants that he signed his own name to the receipts.

That he had some talk with his wife before he went to Zottoli's office; that the first time he knew that his wife had something to do with the fireworks accident was when the case was started in Cambridge and that he didn't know before that time; that he got a letter some time in October, 1927, but he thought the letter only said something about an accident in Everett about a girl, and that he wrote to Natale, who came to see him; that he said to Natale: "What is the trouble between me and this surety company?" And Natale said: "Oh, that is nothing, that is nothing; it has nothing to do with my bond; that is all right, that is nothing; I take care of it, I fix it up." Then Natale came to see me the day the case was started in the night after the court closed and then he said: "Mr. Marotta, the case was started today." And I say: "What [fol. 82] case?" and he say: "Well, the case where your wife went on the bond." I say "What bond?" "Well", he says, "you know the bond, and this is the case, that has just started today, and if you want to come in and see."

The next day he went to court to see how things had gone about the case; that Natale spoke to the witness about getting a lawyer and the witness asked what did he want a lawyer for, and was told if he lost the case he or his wife would have to pay for it, and the witness responded "What have we got to pay for?" I said: "That ain't nothing to do with my wife's paper." That he didn't get a lawyer, that Natale asked him who his lawyer was and he told him Frank Fralli; that Natale asked the witness: "If I sent Fralli over there? and I said that didn't have anything to do with me"; that Fralli went over there because when the case was through they went to see Fralli; that Natale went over to see Fralli; that he didn't get a bill from Mr. Fralli for going over to East Cambridge; that he talked to Mr. Fralli the morning of this trial, and Mr. Fralli has been his general counsel for quite a few years.

On recross-examination the witness testified that he saw Fralli this morning in the court room but that Fralli told

he was here under summons; that he did not employ Frank Fralli and doesn't know who employed him; that he might have had some talk with Fralli about it, but nothing about defending the case; that he knew there was a motion for a new trial in the case and saw a lawyer named Bennett when the case was tried; that he didn't go over to East Cambridge the day the motion for the new trial was to be argued; that on the day of the motion for new trial he doesn't remember whether he talked with Fralli while Mr. Bennett was still there; that he did not talk the case over with him at his office, only talked about whether he would defend him on the case or not.

That he talked about the case with Frank Fralli the same night when the case was over, and Fralli has been his steady lawyer; that Fralli told me that "If they lose the [fol. 83] case we have got to pay for it"; that Fralli went to Providence, Rhode Island, to see Mr. Buss, because Mr. Fralli said he wanted to see how the papers were made out, how the thing was; that he didn't know what papers he was talking about; that he didn't know that Fralli was talking about the paper his wife had signed until afterwards. When I told him about the case he said: "Well I might as well go see how the paper is made—your paper is made." That he told Mr. Fralli his wife had signed some kind of a paper Mr. Natale had asked her to sign, that was at the first talk he had with Fralli.

That he doesn't know how Fralli knew the paper was in Providence; that he didn't tell him it was made out to the American Surety Company at Providence and after Fralli got back he told him how the paper was made; that some paper was made with his wife's signature; that Fralli didn't tell him what the paper was about and he didn't ask; that he didn't ask him whether the paper had anything to do with the case in East Cambridge; that he didn't have any talk with Fralli afterwards about this case; that he knew the jury verdict was $10,000 after two or three days after the trial; that someone saw it in tthe papers.

That he didn't talk with Fralli about getting the amount of the verdict cut down; that he didn't tell him anything but thinks Mr. Natale's lawyer talked with him; that he didn't talk to Fralli about what they said to him; that Mr. Fralli didn't talk to him about paying something less than $10,000 and getting out of the case; that he went to Mr.

Zottoli's rather than to Mr. Fralli to make out the papers because he wanted a change; that he can't tell why he wanted a change; that he didn't tell Mr. Zottoli anything about this case in East Cambridge, and didn't talk over with Mr. Fralli whether he should go to some other lawyer; that Mr. Zottoli had done business for him before, quite a few years ago.

On redirect examination to the question "Mr. Marotta, when you took title in 1906 and 1919 in your wife's name, [fol. 84] did you intend to make her a gift or a present of that property?" the answer was: "No, sir."

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Teresa Marotta, the respondent and alleged bankrupt in the present action, called by the respondent and being duly sworn, testified through an interpreter, James Penta, that she signed a paper in 1927 in a lawyer's office and signed by mark; that she cannot read English, cannot write English, cannot write her name in English; that she is 48 years old and has been in America 30 years; that she had a talk with Natale before she went to the lawyer's office, that in answer to the question as to what paper she thought she was signing there, she answered: "Mr. Natale had told me that he had an attachment on his property of $1,000 and he wanted me to sign this paper to release this attachment to help him out", and that she signed the paper with the understanding it was an attachment bond for $1,000 and Mr. Natale was the person for whom she gave the bond.

That she did not know Mogliani and does not know him today; that she had not heard at any time that she was to give a bond of $15,000 for fireworks accidents; that she does not know what a contract of indemnity is; that she never heard that expression before; that the first time she ever heard about any claim being made against her by reason of an action arising out of fireworks was when they brought her the first papers, the summons in the equity court, when they handed her those papers; that was approximately six months ago in April, 1930.

That in March, 1928 she deeded a parcel of real estate to her husband, and in 1930 deeded the other two parcels, and in answer to the question, "Who requested you to deed

that property?" said: "My husband asked me." "Did you regard the property as yours or your husband's?" The witness answered: "It was my husband's." "What was your reason for regarding the property as your husband's?" "Because he would take out the money." "Did he say anything to you when he bought the property, when you got the property in 1906, if you remember?" The [fol. 85] witness answered: "Yes." "What did he say to you at the time you took title to the property?" The witness answered: "I am buying this parcel of property under your name with the understanding that when I want it back I can have it."

She further testified that she did not pay anything for the property when it was bought; that she never had any money, never had a bank account, never collected any rent on the real estate; that when she took title to the property in 1906 it was not a gift or present to her; that she was willing at all times to give her husband the property whenever he asked for it; that when she made the papers out, the deeds in 1928 and 1930, she knew she had signed a paper in the lawyer's office in 1927; that she didn't think she was on any bonds at the time she made out the deeds because of having signed a paper, and her reason was because she met Mr. Natale and asked him about the signature that she had affixed to certain papers and asked him: "The papers I signed for you, what did you do with them?" He said: "Oh, that is all fixed."

That at the time the papers in bankruptcy were filed against her she had no creditors and didn't owe anything to anyone; that she didn't owe anyone on the day they filed papers in court against her in the bankruptcy court; that when she acquired the Winthrop property in 1919 there was the same understanding about the property that she had in 1906; that when she got that property she did not understand it was intended as a gift or advancement or present to her, but always with the understanding that it was his property.

On cross-examination she testified she went on a bail bond for Mr. DeLuca, who told her to sign on the paper, but she didn't know what it was for; that he was her brother-in-law and her husband told her to go along with him and sign the paper but she could not know what she

was signing; that she didn't think that it was because she had real estate that they wanted her to sign the paper; that Mr. Natale had a talk with her and her husband at their home before they went to Mr. Good's office, and said some- [fol. 86] thing about her signing a paper at that talk; that he asked her to sign that paper because he had an attachment on the property for $1,000 only for a few days and she said: "Yes."

That she did not tell him that she did not have any property when she had the talk with him; that she thinks she had property when she talked with him; that she had the house in Winthrop; that she doesn't remember whether she had the two parcels in Boston; that she was in Mr. Good's office a very little time, ten or fifteen minutes, so long ago she couldn't remember that far back; that she didn't see Mr. Good writing anything while she was there; that she doesn't remember her husband talking with Mr. Good; that her husband and Mr. Good were talking but she couldn't understand because they were talking English; that she doesn't know whether she made her mark once or twice in Mr. Good's office.

That she understood she was going on a bond for $1,000 for Mr. Natale because he told her so. In answer to the question as to whether she knew what a bond was she said: "No." "Mr. Natale had asked me for the favor, and when we come to the lawyer's office he told me to raise my hand, and I put the mark, and that is all I know." In answer to the question as to whether she had gone on a fireworks bond for Mr. Natale three years before, to the Metropolitan Casualty Company, she answered she was asked to put her name down for something about three years ago for Mr. Natale, but they did not tell her what is was about; that Jannini and Natale were together; that Jannini was a brother-in-law of hers who also lives in Winthrop; that she doesn't know whether Jannini got paid anything; that Jannini didn't pay her, that she did not receive any money.

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In rebuttal, William J. Good, recalled, testified at the time the papers were signed in his office, Exhibits 6 and 7, he didn't hear Mr. Natale say it was a $1,000 bond to discharge

an attachment; that the Marottas were in his office at least a half hour; that all the handwriting on Exhibit 7 was made by him including the figures; that there was no writing on the first page or any writing or figures on the [fol. 87] last page of Exhibit 7 when Mr. and Mrs. Marotta came into his office; that all the writing on those pages was made in their presence.

On cross-examination Mr. Good testified in answer to the question as to whether he talked with Mrs. Marotta, asking her questions on those papers; that she and her husband were there together and his conversation would be addressed to both of them. As to whether he appreciated that Mrs. Marotta could not talk English, he said, as he remembered it, she could talk a little English; that he was testifying only as to what happened in English; that there was some conversation in Italian between the Marottas and Natale and they also talked in English and Italian both.

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Antonio Natale, recalled, testified that the Marottas were in Mr. Good's office between twenty and thirty minutes; that they came in his machine driven by Michael Vallanti; that he didn't tell the Marottas that the bond he wanted her to give was a $1,000 bond nor a bond to dissolve an attachment; that he saw Mr. Good write the words and figures on Exhibit 7, and Mr. and Mrs. Marotta were present when they were written, and the words were not written on the paper before Mr. and Mrs. Marotta came; that the Marottas were sitting near Mr. Good's desk where he was writing and could see him writing them.

On cross-examination Mr. Natale testiged that he remembered when Mrs. Marotta held up her hand when the acknowledgment was taken, and he did not have to talk to her in Italian; that Mr. Good spoke to her in English. In answer to the question as to what Mr. Good said to her when he took her acknowledgment he said he didn't remember. In answer to the question: "Did he read off some words to her? Was that it?" He answered: "I don't remember, because that is none of my business." He testified he paid him $800 and did not get a receipt; that it was paid in cash; that he didn't draw a check for

Mogliani before or anything like that; that this was Mog- [fol. 88] liani's bond and Mogliani had a business and he didn't know whether Mogliani had a checking account, and that he worked for Mogliani; that Mogliani used to pay cash for everything, and had no checking account as far as he knew.

On redirect examination Natale testified he had a talk with Mr. Marotta about the time the case came up in East Cambridge, in Marotta's office, with Mr. Bennett, the lawyer who tried the case; that Mr. Bennett, Mr. Mogliani and he were there; that Mr. Bennett explained everything to Marotta;; that Mr. Marotta was asked if it was all right for Mr. Bennett to try the case and Mr. Marotta said to Mr. Bennett: "All right; go ahead and do the best you can." That the witness doesn't know Mr. Fralli; that he had no talk with Mr. Fralli about the case; that he never had any business with him.

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Michael Vallanti, called by the petitioner and being duly sworn, testified he lives at 106 Ethan Street, Providence, R. I.; that he was working in 1927 for Mogliani; that he put on fireworks exhibitions for Mogliani in certain towns, and remembers taking Mr. and Marotta into a lawyer's office in Boston, and got them at Mr. Marotta's store; that that was the only time he ever took them, and he took them back the same day; that he took them to Mr. Good's office; that they went to the office and he had to keep going down to the car because he couldn't park, and they were there about half an hour, and that he took them back to the store after the interview; that he found the company that would put up the bond, the American Surety Company; that was his connection with the fireworks bond; that he talked with Mr. Buss before he went to Mr. Good's office; that later on he brought Marotta $500 at his store; that Mogliani gave him the $500; that he told Marotta he brought him the money for the bond; that nothing was said about $300 having been paid before that time.

On cross-examination he testified that he didn't take a receipt for the $500 from Mr. Marotta; that Mogliani has gone out of business, some time in 1928 or 1929.

[fol. 89] FRANK P. FRALLI, called by the petitioner and being duly sworn, testified that he has been a member of the Suffolk Bar for 20 years, and that he had something to do in respect to the case of Ricci v. Mogliani in the Middlesex Superior Court in a general way; that he urged Bennett to press his motion for a new trial against Mr. Sampson's advice, and he did press it and that he was present at the hearing on the motion for a new trial, and was employed for that purpose by Arcangelo Marotta; that during the progress of the trial Mr. Marotta came to see him and owing to an actual engagement of the witness in the Suffolk Superior Court he could not do anything for him; that after the jury brought in a verdict for the plaintiff, Marotta came in with a story of certain facts; that his wife had signed a paper; that after the verdict he did all he could; that he had three conferences with Marotta, may have been four.

That he remembers being in East Cambridge at ten o'clock one morning expecting that the arguments for motion for new trial would take place; that the arguments were postponded until afternoon: that he doesn't know whether Marotta was there in court that morning; that he didn't see Mrs. Marotta about the case at any time; that he doesn't know her except that he met her in 1928 and saw her this morning; that he acted for Marotta up to and including the date upon which the court made an order that the verdict be cut down; that he conferred with DiCecca, the counsel for the plaintiff, in his proposed settlement at the request of Mr. Sampson; that he reported what he was doing to Mr. Marotta.

On cross-examination he testified that he doesn't know when the trial started in East Cambridge, but during the progress of the trial Mr. Marotta came to him and he could not assist him because of his engagement.

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WILLIAM E. BENNETT, called by the petitioner and being duly sworn, testified that he is a member of the Boston Bar, connected with the office of Dallinger & Stearns; that he [fol. 90] tried the case of Ricci v. Mogliani for the defendant, and before the trial had an interview with Arcangelo Marotta at his place, Mogliani, Natale and Vallanti were

there, and that Marotta and his son were present, and he told them he was about to go on trial and there was very serious injury involved; that if Marotta was stuck he was liable to be stuck for a very large sum; that he thought a verdict would be rendered against the defendant; asked him if he wanted to settle it; that his client Mogliani was not able to make an offer which the plaintiff would accept and asked Mr. Marotta to contribute towards it.

Mr. Marotta did not want to make an offer of settlement and the witness asked him if he was satisfied that the witness would go ahead and try it, and he advised Marotta that he had an interest at stake and he might want to get his own attorney, but Marotta said no to go ahead and try the case; that he told Marotta his wife was on the bond, and he assumed he and his wife would have to pay it; that he was dealing with Mr. Marotta, not with his wife, but he told Marotta that his wife was on the bond; that he didn't tell him anything about the nature of the bond; that the only thing in that connection is that he told him he might get stuck ten or twelve thousand dollars.

That he saw Mr. Marotta after the verdict, in the Middlesex court; that he told him he was going to make a motion to have the verdict reduced or set aside and the damages reduced; that he misunderstood the clerk to say the motion would be heard at ten o'clock and told Mr. Marotta to be over there at that time, and met him there at ten o'clock, and was then informed by the clerk that the motion would not be heard until 4, and he informed Mr. Marotta of it; that he didn't recollect seeing Mr. Marotta talk with Mr. Fralli that morning, but saw the two of them separately at the court house that day; that Fralli sat with the witness at the time of the argument for the motion for new trial, and had one or two conferences with him before the motion.

On cross-examination he testified he was a member of the Bar since 1927 and in answer to the question as to whether [fols. 91 & 92] he ever tried a tort case before this one over there, the answer was: "Yes." And in answer to the question: "How many tort cases have you tried?" the answer was: "I have never tried one before a jury."

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Raymond Buss, recalled, testified that the American Surety Company received $75 premium in connection with

the Mogliani fireworks bond, and that the Surety Company did not receive any other consideration from anybody except Mrs. Marotta's indemnity agreement and Mogliani's indemnity agreement; that he had no collateral of any sort and had no information from any source when he delivered this bond to Mogliani; that Mrs. Marotta claimed she did not understand what she was signing.

George I. Cohen, Counsel for Teresa Marotta.

Narrative form assented to.
Hutchins & Wheeler, Counsel for Petitioner.

October 29, 1931.

Condensed statement of evidence approved.
James A. Lowell, United States District Judge.

(Here follows Exhibit 1, side folios 93 and 94.)

THE COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF PUBLIC SAFETY

DIVISION OF FIRE PREVENTION

STATE HOUSE, BOSTON, MASS.

(General Laws, Chapter 148, as amended by St. 1921, Chapter 500.)

# Surety Bond

Discharging, Firing-Off, Exploding or Displaying Fireworks at any Public Exhibition or Exhibitions.

**Know All Men by these Presents,** That we MARIO MOGLIANI, doing business as CENTREDALE FIREWORKS COMPANY of CENTREDALE, TOWN OF NORTH PROVIDENCE, STATE OF RHODE ISLAND in the county of PROVIDENCE in the Commonwealth of Massachusetts, as Principal, and AMERICAN SURETY COMPANY OF NEW YORK as surety are holden and stand firmly bound unto the Treasurer and Receiver General of the Commonwealth of Massachusetts in the just sum of FIFTEEN THOUSAND dollars to be paid to the said Treasurer and Receiver General or his successor or successors in office, to which payment well and truly to be made, we hereby jointly and severally bind ourselves, our respective heirs, executors and administrators, successors and assigns, firmly by these presents.

**The Condition of this Obligation** is such that if the said MARIO MOGLIANI d/b as CENTREDALE FIREWORKS COMPANY his heirs, executors and administrators, successors and assigns, shall pay any judgment obtained in an action brought against the said PRINCIPAL for discharging, firing-off, exploding or displaying fireworks at any public exhibition or exhibitions thereof, for or on account of any loss, damage or injury resulting to persons or property by reason of the said discharging, firing-off, exploding or displaying of said fireworks, at said public exhibition or exhibitions, provided that said judgment is obtained in an action brought within a period of twelve months following the date of the public exhibition or exhibitions, at which the cause of said action is alleged to have occurred, then this obligation shall be void, otherwise it shall remain in full force and effect.

**In Witness Whereof,** we hereunto set our hands and seals, this 18th day of APRIL, A. D. 19 27

Signed, Sealed and Delivered in presence of us.

W. P. Hawes

R. H. Cherry

H. L. Rohab

Mario Mogliani [SEAL]

d/b as CENTREDALE FIREWORKS COMPANY

AMERICAN SURETY COMPANY OF NEW YORK

By H. J. Horgan [SEAL]

Asst. Vice-President

Attest Gerritsen [SEAL]

Resident Assistant Secretary

PROVIDENCE, R. I.

Then personally appeared the above-named principal on this 18th day of APRIL, 1927 and acknowledged the foregoing instrument to be his free act and deed.

Before me,

Marjorie A. Burns

Notary Public

The amount of the bond approved,

Timothy O. Murphy

State Fire Marshal

Approved as to Surety,

L. F. Wilson

Treasurer and Receiver General

[fol. 95] EXHIBIT 2

[On printed letterhead of American Surety Company of New York, 100 Broadway, New York]

Boston (9), Mass., Apr. 16, 1927.

Re Fireworks Bond

Raymond Buss, Mgr. American Surety Co. of N. Y., 10 Weybosset Street, Providence, R. I.

DEAR MR. BUSS: When we were talking over the telephone I neglected to ascertain from you whether the bond you required was an exhibition bond or a storage bond; therefore, I have executed in blank one of each kind. Please destroy the one you do not use.

I am also sending you a blank copy of exhibition bond but not one of storage as I have not another blank in the office at the present time.

Very respectfully, E. F. Philbrick, Manager, by T. J. Gargan.

G/D Encs.

[Stamped:] Received Apr. 18, 1927, Providence, R. I., Branch Office.

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EXHIBIT 3

[On printed letterhead of American Surety Company of New York]

RB. Providence, R. I., March 15, 1928.

Re 693,033-B, Mario Mogliani D/B as Centredale Fireworks Co.

Mrs. Teresa Marrota, 490 Pleasant Street, Winthrop, Mass.

DEAR MADAME: Under date of April 18th, 1927, you signed an indemnitor's agreement of our Company in behalf of the Centredale Fireworks Company, agreeing to hold us harmless in connection with the issuance of a bond

of $15,000.00, required by the State of Massachusetts for the giving of fireworks- exhibitions. We are informed in a [fol. 96] letter from an Attorney in Boston, a Mr. Oliver DiCecca that he has a claim against the Centredale Fireworks Company, concerning injuries to a girl named Beatrice Ricci. Under the terms of the indemnity agreement signed by you, you are supposed to hold this Company harmless against such claims.

Very truly yours, Raymond Buss, Manager.

W.

(Here follows Exhibit 4, side folios 97 and 98)

88A
97-98

Telephone 1280 Richmond

EXHIBIT NO. 4

# A. MAROTTA & CO.

WHOLESALE

249-251 NORTH STREET

Boston, Mass., July. 31st, 192

Hon. Raymond Buss, Mgr,
American Surety Company.
;-Of New York ;-

Dear Sir;- Re; 693033- B. R. B ,

I herewith inform you that I Arcangelo Marotta, and my wife Teresa-Marotta. of 491 Pleasant Street, Winthrop. Massachusetts:- we have Sined a Bond through your Company, to Antonio Natale. And Merio -- Mogliani, of Centerdale. Rhode Island,

Now me and my wife have diseded to have said Bond Cancilled and returned to us the said Bond at once

We beg to remain yours very Respectfully ;-

Arcangelo Marotta

Ar Teresa Marotta

491 Pleasant. Street;-

Winthrop, Massachusetts;-

P. S.

We have Sined The said Bond on The Ten day of April-1928

[fols. 99 & 100] EXHIBIT 5

August 1, 1928.

Re 693,033 B, Centredale Fireworks Company to State of Massachusetts

Arcangelo Marotta & Teresa Marotta, 491 Pleasant Street, Winthrop, Mass.

DEAR MADAM AND SIR: We are in receipt of your letter dated July 31, 1928 referring to a bond of Antonio Natale and Mario Mogliani, Centredale, R. I. You state that you signed this bond about April 10, 1928. I wish to correct your impression slightly as you did not sign a bond, although you did sign an application for a bond made by the above mentioned people. You need feel no concern in this particular connection as we did not issue any bond in behalf of Mr. Natale or Mr. Mogliani in connection with the application referred to. I do not find this application on our files and I presume it has been destroyed.

I would call your attention, however, to the fact that we did issue a bond in the year 1927 in behalf of Mr. Mogliani doing business as Centredale Fireworks. This bond was in the amount of $15,000 and in favor of the State of Massachusetts permitting Fireworks exhibitions. In connection with this bond issued in April 1927 Mrs. Marotta signed an application and Indemnity Agreement guaranteeing to hold us harmless from loss as a result of the issuance of the bond.

Very truly yours, —— ——, Manager.

IF.

(Here follow Exhibits 6 and 7, side folios 101-114)

90A
101-102

# EXHIBIT NO. 6

**Financial Statement, Form C 413 is required in every case where collateral is not furnished to the full amount.**

Form C413 Revised 1934 2 27

COMPANY'S HOME OFFICE BUILDING

## American Surety Company

of New York

CAPITAL $5,000,000

## APPLICATION FOR A COURT OR MISCELLANEOUS CONTRACT BOND

Branch Office at .....

Credit Agency at ..... { Agent / Atty.

Bond No .....

Sub-Agency Bond No .....

Amount 15,000 ~~00~~

Premium 75.00 for 1 month

Place and Date of this Application: Prov. R.I. (Place) April 18 (Date) 1927

NOTE — If the required information is not given in response to the foregoing questions it will be necessary to return this blank for completion. The answers will be treated as strictly confidential.

*To American Surety Company of New York:*

*Application is hereby made for a bond of suretyship, as follows:*

1. Name, business address and residence
(In the case of a partnership add name and residence of each partner; in the case of a corporation add name and residences of the four principal officers, and state date of organizing or incorporation.)

Mario Brogliana d/b as Interdale Fireworks from Jany 1927 principal office and residence R.I.

2. State nature of business. Fireworks

3. Name and address of attorney.

4. Amount of bond £ 1,000

5. Probable length of time bond will run. State of Mass.

6. Name and address of obligee (in whose favor bond is required).

7. Have you applied to any other surety company for this bond? If so, give full particulars.

no

8. Describe fully the transaction in which bond is required. State nature and character of the bond or undertaking, name of court, title of action, nature of liability, amount of judgment or claim, character of contract, etc. Annex copy of lease, contract, or other pertinent papers.

Fireworks Bond

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9 References. (Bankers and merchants preferred.)

| Name | Occupation | Address |
|---|---|---|
| 1. | | |
| 2. | | |
| 3. | | |
| 4. | | |
| 5. | | |

Should the American Surety Company of New York, hereinafter called the Surety, execute, or procure the execution of the suretyship hereinbefore applied for, or other suretyship in lieu thereof, the undersigned, hereinafter called the Indemnitor, do ..... in consideration thereof, jointly and severally undertake and agree.

I. That the statements contained in the foregoing application are true.

II. That the Indemnitor will immediately pay the Surety at its office, 100 Broadway, New York City, $ 75.00 and ..... on the ..... day of ..... in each year, until the Indemnitor shall serve upon the Surety competent, written, legal evidence of its final discharge from such suretyship, and any and all renewals and extensions thereof.

III. That the Indemnitor will perform all the conditions of said bond, and any and all modifications, renewals and extensions thereof, and will at all times indemnify and save the Surety harmless from and against every claim, demand, liability, cost, charge, counsel fee (including fees of special counsel whenever by the surety deemed necessary) expense, suit, order, judgment and adjudication whatsoever, and will place the Surety in funds to meet the same before it shall be required to make payment, and in case the Indemnitor requests the Surety to join in the prosecution or defense of any legal proceeding, the Indemnitor will, on demand of the Surety, place it in funds sufficient to defray all expenses and all judgments that may be rendered therein. The Indemnitor will not ask or require the Surety to remove or join in any application for the removal of any proceeding from a state court to a federal court in any state where such action would in any way affect the Surety's right to transact business.

IV. That the suretyship is for the special benefit of the indemnitor, its property, income and earnings now owned or hereafter acquired, to which the Surety looks for its indemnity, and the Indemnitor represents that it is specifically and beneficially interested therein.

V. That the Surety shall have every right and remedy which a personal surety without compensation would have, the right to secure its discharge from its suretyship and in the absence or default of its principal the Surety may at its option exercise all rights of said principal, and should it make payment hereunder shall have every right and remedy of the Indemnitor for the recovery of the same. The Surety is hereby expressly authorized to fill up any blanks left herein, and to correct any errors in the description of said bond or bonds or any of them, and in the amount or date of payment of said premium or premiums.

VI. That this agreement shall cover not only the suretyship above recited, but all alterations, renewals, extensions or modifications thereof which may be requested or assented to by the Principal named in such obligation. That the Surety shall have the right to pay or compromise any claim or charge of the character enumerated in this agreement, and the voucher or other evidence of the payment thereof shall be prima facie evidence of the fact and of the Indemnitor's liability therefor to the surety.

VII. That all the terms and conditions of this agreement shall stand for the protection of any co-surety, any reinsuring company or any other surety procured by the American Surety Company of New York above named, whether the American Surety Company of New York does or does not execute or retain any portion of any such obligation.

VIII. That the Indemnitor has pledged with said Surety, as collateral security hereto and for all claims of said Surety against the Indemnitor:

.....

.....

.....

.....

and hereby agrees to keep on deposit at all times until complete performance of this agreement, and the expiration, without appeal or proceedings to review, of the time to appeal from or review, any adjudication or determination directly or indirectly fixing or discharging such liability, securities acceptable to the Surety of the value of $ ..... with authority to the Surety, on non-performance of any part of this agreement or any other contract between the parties hereto, without notice of amount claimed and without demand, in case said collateral is cash, to pay therefrom any sum which the Indemnitor may become liable to pay the Surety by reason of any contract between the parties hereto; and in case such security is the obligation of any person, at its election to sell the same at public or private sale or to collect the same, by action or otherwise, and apply the proceeds thereof to the payment of any sums which may become due under any contract between the parties hereto; and in case such security consists of stocks, bonds, or other similar securities, to sell the whole or any part thereof, or any substitutes therefor, or any additions thereto, without notice at any broker's board, or at public or private sale, and to apply the proceeds thereof to the payment of any sum which may be due under any contract between the parties hereto; and upon any sale at auction or broker's board by virtue of this agreement the Surety may purchase the whole or any part of said property, discharged from any right of redemption, which is expressly released to said Surety.

(2)

90C

105-106

Signed and sealed April 18 1927

Signed, sealed and delivered in the presence of:

Mario Mogliani

Teresa X Martha
her
Mark

Wm J Good to -
Holman W. Hanna -

State of Massachusetts
County of Suffolk } ss.:

On the 15 day of April 1927, before me personally appeared Teresa Martha to me known and known to me to be the person described in and who executed the foregoing instrument, and she thereupon acknowledged to me that she executed the same.

Wm J. Good
Notary Public

State of
County of } ss.:

On the day of in the year before me personally came to me known, who, being by me duly sworn, did depose and say: that he resides in that he is the President of the the corporation described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order.

Within application received at the agency of the American Surety Company of New York at on the day of

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(5)

Form C 413 Revised 1924 2 26

EXHIBIT NO. 7 107-108

# American Surety Company of New York

## FINANCIAL STATEMENT.

(In the case of a firm use additional separate financial statement for each partner.)

NOTE: Items inapplicable may be left blank.

Jesus Martha

(Name of Individual, Firm or Corporation)

Give full address 491 Bryant St Sanitary Nature of business

At the close of business on the 15th day of April 1927

| | | | | | |
|---|---|---|---|---|---|
| **QUICK ASSETS** | | | **CURRENT LIABILITIES** | | |
| Cash on hand (NOT in bank) | $ | 1000 | Debts due to laborers and employes | $ | |
| Cash in following banks (Give addresses) | | | Notes Payable, unsecured | | |
| | | | Notes Payable, secured by collateral | | |
| | | | State nature of collateral: | | |
| | | | | | |
| | | | | | |
| Stocks, Bonds and other securities listed in Schedule "A" on Page 2 hereof | | | Accounts Payable. (For Merchandise or Materials, only) | | 00 00 |
| Merchandise on hand, at cost, finished | | | Accounts Payable. (Other than for Merchandise or Materials) | | |
| Merchandise on hand, at cost, unfinished | | | Other Current Liabilities: | | |
| Of what does this Merchandise consist? | | | | | |
| | | | | | |
| Notes Receivable, secured by collateral | | | | | |
| Notes Receivable, unsecured or with additional endorsements | | | *Total Current Liabilities* | $ | |
| Accounts Receivable, earned on completed and uncompleted contracts as stated in Schedule "B" and "C" on Page 3 hereof | | | **FUNDED DEBTS** | | |
| Accounts Receivable, due from other sources | | | Chattel Mortgages or other Liens on Plant, Equipment, Fixtures, etc. (Describe, giving original amount, amount paid and terms of payment of balance due | | |
| Other quick assets: | | | | | |
| | | | | | |
| | | | Mortgages and other debts secured by lien on Real Estate, as per Schedule "D" on Page 4 hereof | | 32 000 |
| *Total Quick Assets* | $ | | Other Debts maturing in one year or more secured by collateral (Describe) | | |
| **FIXED ASSETS** | | | | | |
| Mortgages and other assets secured by lien on Real Estate as listed in Schedule "D" on Page 4 hereof | | | *Total Funded Debts* | $ | |
| Real Estate as listed in Schedule "E" on Page 4 hereof | | | **RESERVES** | | |
| Land (at Market Value) $ 45000 | | | 1. | | |
| Improvements Completed $ 30000 | | 75000 | 2. | | |
| Plant at Cost $ | | | 3. | | |
| Less Depreciation $ | | | 4. | | |
| Patents | | | *Total Reserves* | $ | |
| Good Will | | | *Surplus* (Of a Corporation, etc.) | | |
| Other Fixed Assets: | | | *Capital*—Authorized $ | | |
| Additional R.E. Page 4 | | 15500 | Less amount not issued $ | | |
| | | | Paid in Capital | | |
| | | | *Net Worth* (Of an individual or firm) | | |
| *Total Fixed Assets* | $ | | *Total Net Worth* | $ | |
| *Total of All Assets* | $ | | *Total of All Liabilities, Reserves, etc.* | $ | |

The maker of the foregoing statement hereby authorizes the company to confirm the bank balances claimed and all other items comprising said statement.

The undersigned ..... (in the case of an individual, the undersigned; in the case of a firm, all of the partners; in the case of a corporation, two of the principal officers) hereby certif.. ..... that each statement hereinbefore contained is true and that this statement is made for the purpose of inducing the American Surety Company of New York to execute certain bonds or undertakings without demanding collateral security for the full amount thereof.

Dated April 15, 1927 SIGN HERE

William Wark
Vice Pres
Norman W. Haines

Teresa Lu X Marotta (L. S.)
Mark (L. S.)
..... (L. S.)
..... (L. S.)

In the case of a co-partnership, similar financial statement from each individual partner should be obtained if the amount of credit required exceeds that warranted by the firms' statement.

## SCHEDULE A: STOCKS and BONDS

| DESCRIPTION | Par Value | Market Value | Pledged to Secure |
|---|---|---|---|
| BONDS | | | |
| | | | |
| | | | |
| | | | |
| | | | |
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## SCHEDULE B: UNFINISHED CONTRACTS 111-112

| DESCRIPTION<br>Give date when it is expected contract will be completed. | Total Contract Price | Amount uncompleted at the Contract Price | Earned (Unpaid) on uncompleted Contracts |
|---|---|---|---|
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## SCHEDULE C: FINISHED CONTRACTS NOT FULLY PAID FOR

| DATE COMPLETED | Contract Price | Amount Unpaid | Reason for Retention |
|---|---|---|---|
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| *Total* | | | |

## SCHEDULE D: MORTGAGES OR OTHER ASSETS secured by lien on REAL ESTATE

| DESCRIPTION | First or Second | Face Value | Pledged as Collateral |
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## SCHEDULE E: REAL ESTATE

| DESCRIPTION State whether improved and, if so, how? Give location and complete description | Net Annual Revenue | MARKET VALUE Land | MARKET VALUE Improvements | Assessed Value | Mortgages |
|---|---|---|---|---|---|
| 270 North St Wooden Store & Tenement 14 Lucia | 900 | 10000 | 2500 | 8000 | 2500 |
| 272-274 North St Brick | 900 | 10000 | 2500 | 8000 | 2500 |
| 247-251 North St. Brick Brick store + factory | 2900 | 25000 | 25000 | 38000 | 27000 |
| 491 Pleasant St Dwelling (frame) | — | 3500 | 12000 | 10500 | 7500 |
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[fol. 115] EXHIBIT 8

COMMONWEALTH OF MASSACHUSETTS,
Middlesex, ss:

I, Ralph N. Smith, Clerk of the Superior Court within and for the County of Middlesex, in said Commonwealth, do certify that James H. Sisk, Esquire, whose proper certificate is hereunto annexed, is an Associate Justice of the said Superior Court.

In testimony whereof, I hereunto set my hand and affix the seal of said Superior Court, this eleventh day of October in the year of our Lord one thousand nine hundred and thirty.

Ralph N. Smith, Clerk. (Seal.)

COMMONWEALTH OF MASSACHUSETTS:

I, James H. Sisk, an Associate Justice of the Superior Court of the Commonwealth of Massachusetts, Do certify that Ralph N. Smith, Esquire, whose signature is affixed to the papers hereunto annexed, is Clerk of said Superior Court for the County of Middlesex, and hath the keeping of the files, records and proceedings of said Court within and for said County; that he is, by law, the proper person to make out and certify copies of the files, records and proceedings of said Court; that full faith and credit are and ought to be given to his acts and attestations done as aforesaid; and that his attestation to the papers hereunto annexed, of the files, records and proceedings of the said Superior Court, is in due form.

In testimony whereof, I have set my hand, and caused the seal of said Court to be hereunto affixed, this eleventh day of October, in the year of our Lord one thousand nine hundred and thirty.

James H. Sisk, Justice of the Superior Court. (Seal.)

[fol. 116] COMMONWEALTH OF MASSACHUSETTS,
Middlesex, ss:

To all persons to whom these presents shall come, Greeting:

Know ye that among our records of our Superior Court within and for the County of Middlesex, Anno Domini 1930, it is thus contained, *it* wit:

COMMONWEALTH OF MASSACHUSETTS,
Middlesex, ss:

[L. s.] To the sheriffs of our several counties or their deputies, Greeting:

We command you to attach the goods and estate of Mario Mogliani, sometimes known as Mariano Mogliani, of Everett, in said County, to the value of twenty-five thousand dollars, and summon the said defendant (if he may be found in your precinct) to appear before our Justices of our Superior Court, at Cambridge, within and for our said County of Middlesex, on the first Monday of May next: then and there in our said Court to answer unto Beatrice Ricci, a minor, who brings this action by Nicola Ricci, her father and next friend, both of Everett, in our County of Middlesex, in an action of tort, to the damage of the said plaintiff (as she saith) the sum of twenty-five thousand dollars, which shall then and there be made to appear with other due damages. And have you there this writ, with your doings therein.

Witness Walter Perley Hall, Esquire, at Cambridge, the twelfth day of April, in the year of our Lord one thousand nine hundred and twenty-eight.

Ralph N. Smith, Clerk.

Upon which writ the officer serving the same made the following return, to wit:

MIDDLESEX, ss:

April 13, A. D. 1928.

By virtue of this writ, I this day attached a chip as the property of the within-named defendant, Mario Mogliani, [fol. 117] sometimes known as Mariano Mogliani, and summoned him to appear and answer at Court by giving a summons of this writ to him in hand.

Fred A. Beals, Deputy Sheriff.

Fees: Service, $1; travel, .50; motor v., .45—$1.95.

In the service of this precept it was necessary, and I actually used a motor vehicle 3 miles.

Fred A. Beals, Deputy Sheriff.

On the first Monday of May, A. D. 1928 (being the seventh day of said month), the plaintiff appeared by

Oliver B. Di Cecca, Esquire, her attorney, entered said action, and filed the following declaration, to wit:

COMMONWEALTH OF MASSACHUSETTS,
Middlesex, ss:

SUPERIOR COURT

BEATRICE RICCI, p. p. a.,

vs.

MARIO MOGLIANI, alias —— ——

PLAINTIFF'S DECLARATION

Count I. And the plaintiff, a minor, who brings this action by Nicola Ricci, her father and next friend, says that on the twenty-sixth day of September, 1927, while she was lawfully at a public place in Everett, in the County of Middlesex and Commonwealth of Massachusetts, and in the exercise of due care, the defendant, his agents or servants, unlawfully, wilfully, carelessly and negligently, by means of some explosives, unknown to the plaintiff, caused to be discharged from a mortar a bomb, or a setpiece of fireworks, the nature of which is unknown to the plaintiff, which struck the plaintiff with great force and inflicted upon her a severe personal injury, causing her much mental and physical suffering, and permanently incapacitating her future labor, and putting her to great expense in the hire of medical attendance and nursing.

Count II. And the plaintiff further declaring for the [fol. 118] same cause of action says that on the twenty-sixth day of September, 1927, the defendant undertook for hire to give a display of fireworks in a public place in said Everett, in the presence of a large gathering of people, and in carrying out said display caused to be discharged into the air with great force and to a great height by means of some explosives, certain heavy and dangerous projectiles known as bombs and setpieces of fireworks, filled with certain dangerous inflammable and explosive material for rendering apart said bombs and setting afire the said setpieces; that in carrying out said display by means of the dangerous explosive material and projectiles so discharged, as aforesaid, the defendant was bound to furnish, provide and use bombs and setpieces properly constructed so as to be reasonably safe for the purpose aforesaid, and to dis-

charge, explode and display the same carefully, and skilfully and with due regard for the safety of the people gathered as aforesaid, and to exercise great care that the place which the bystanders occupied should be beyond the danger area in accordance with the statute, rules and regulations so provided by the Commonwealth of Massachusetts and the Department of Public Safety; that the defendant, his agents or servants, being wholly regardless of his duty in this respect, wilfully, carelessly and negligently furnished, provided, and used certain dangerous and defective bombs and setpieces, improperly constructed, and discharged the same carelessly, recklessly and unskilfully, and failed to exercise great care that the place which the bystanders occupied should be beyond the danger area in accordance with the statute, rules and regulations aforesaid, by reason whereof the plaintiff, on the day aforesaid, while lawfully in said public place, and in the exercise of due care, was struck by one of said bombs or a portion of one of said setpieces which became detached, or improperly constructed and carelessly discharged, with great force, and was severely injured, causing her much mental and bodily suffering and permanently crippling and incapacitating her, and putting her to great expense in the hire of medical attendance and nursing.

[fol. 119] To her damage as she says in her writ.

By Her Attorney, Oliver B. Di Cecca.

Said plaintiff upon her said writ, claimed a trial by jury.

On the seventeenth day of May, A. D. 1928, the defendant appeared, by Messrs. Dallinger and Stearns, his attorneys, and filed his answer, to wit:

COMMONWEALTH OF MASSACHUSETTS,
Middlesex, ss:

SUPERIOR COURT

BEATRICE RICCI, p. p. a.,

vs.

MARIO MOGLIANI, alias —— ——

DEFENDANT'S ANSWER

Now comes the Defendant in the above-entitled action and for answer denies each and every allegation, item,

count, and particular in Plaintiff's writ and declaration contained, as fully and specifically as are therein alleged.

And further answering, the Defendant says that at the time and place alleged in Plaintiff's declaration, the Plaintiff, herself, was not in the exercise of due care, but was guilty of negligence which contributed to her injuries.

By His Attorneys, Dallinger & Stearns.

(Filed May 17, 1928.)

On the eighteenth day of May, A. D. 1928, the plaintiff filed the following interrogatories to be answered by the defendant, to wit:

COMMONWEALTH OF MASSACHUSETTS,
Middlesex, ss:

SUPERIOR COURT

BEATRICE RICCI, p. p. a.,

vs.

MARIO MOGLIANI, alias —— ——

INTERROGATORIES PROPOUNDED BY THE PLAINTIFF TO THE DEFENDANT TO BE ANSWERED UNDER OATH

1. Please state your:
(a) Name.
[fol. 120] (b) Age.
(c) Place of business.
(d) Residence during the past five years.
(e) Your present occupation.
(f) Your occupation on September 26, 1927.
(g) Your occupation during the past five years.
(h) Your place of business at the present time.
(i) Your place of business during the past year.

2. Have you at any time engaged in the business of manufacturing fireworks? If so,
(a) Where.
(b) When.
(c) The type of fireworks that you have manufactured.
(d) The extent of your experience in so manufacturing fireworks.

(e) Whether you have a certificate of competency as to your ability to manufacture fireworks.

3. Have you at any time engaged in the business of displaying or setting off fireworks either in the Commonwealth of Massachusetts or any other State? If so, please state:

(a) When and where you have so displayed or set off fireworks.

(b) Whether or not you have filed a bond with the Treasurer and Receiver-General of the Commonwealth of Massachusetts as required by the Commonwealth of Massachusetts.

(c) The extent of your experience, or that of your agents or servants, in so displaying or setting off fireworks.

4. Were there any fireworks displayed or set off by you or your agents or servants, in the City of Everett, Massachusetts, on or near Kelvin Street so called on September 26, 1927? If so please state:

(a) Whether or not said fireworks were manufactured by you, or your agents or servants, and, if so, please describe the various pieces of fireworks set off at that time. [fol. 121] (b) Were you present at and did you supervise said exhibition.

(c) Please give the names and addresses of your agents or servants who represented you at said exhibition.

(d) Please give the name and description of each chemical used by you in the manufacture of the fireworks set off by you, or your agents or servants, on September 26, 1927, on or near Kelvin Street, Everett, Massachusetts.

5. Are you familiar with the Statutes and the rules and regulations governing the display or setting off of fireworks in the Commonwealth of Massachusetts?

6. Did you comply with all the requirements of the said statutes, rules and regulations on September 26, 1927, at said place?

7. If your answer to Interrogatories 5 and 6 is in the affirmative please state in detail what you did in order to comply with the statutes, rules and regulations as aforesaid on said occasion.

8. Are you acquainted with the plaintiff in this action and her parents? If so, please state:
(a) When you first met them.
(b) Under what circumstances you met them.
(c) What transpired at this meeting or meetings.
(d) The number of such meetings and dates of same.

9. Please state whether or not any one was injured by the fireworks which were displayed or set off by you, or your agents or servants, on September 26, 1927, in the City of Everett, Massachusetts, on or near Kelvin Street so called.

10. If your answer to the previous interrogatory is in the affirmative will you please give:
(a) Names and addresses of all persons injured.
(b) The cause of injury.
(c) The manner in which they were injured.
(d) Description in detail of fireworks causing injury.

11. Please state whether or not any bombs exploded improperly at the display or exhibition given by you, or your agents or servants, on September 26, 1927, in Everett aforesaid.

[fol. 122] 12. Please state:
(a) Whether any of the setpieces displayed or exhibited by you, or your agents or servants, on September 26, 1927, at Everett aforesaid, burned or exploded improperly.
(b) The number of such pieces.
(c) The description in detail of such pieces.
(d) The cause of same.
(e) The manner in which the setpieces mentioned herein or the bombs mentioned in Interrogatory 11 were affixed to the ground preparatory to being set off.

13. From your experience as a manufacturer of fireworks, please state whether setpieces of fireworks or bombs are properly manufactured or are properly set off if large sections or balls or masses of fire are hurled from them into and amongst the spectators present at any exhibition.

14. Please state whether or not any of the bombs or setpieces set off by you, or your agents or servants, on Sep-

tember 26, 1927, at Everett aforesaid, burned or exploded improperly and whether or not any portion thereof was thrown among the spectators while burning.

15. Please state whether or not the plaintiff in this action was injured as a result of the burning or explosion of a bomb or setpiece of fireworks on said night at the aforesaid exhibition.

16. Describe the plot of ground on which the said fireworks were displayed on September 26, 1927, stating whether or not it was situated close to or within a residential district or near a public highway in the City of Everett, Massachusetts.

17. What precautions, if any, did you, or your agents or servants, take to safeguard the spectators at said display?

18. What was the distance between the Westerly line of said Kelvin Street and the spot on which the said fireworks were erected preparatory to displaying or setting off the same?

19. Did you, or your agents or servants, separate by guards, rope or other barriers the area on which the fire-
[fol. 123] works were to be displayed or set off from the area on which the spectators were to be permitted to stand?

20. Please state the distance in feet between the nearest spectators and the spot on which the fireworks were set off.

21. Please state the time when the plaintiff in this case was injured.

22. What, if anything, did you do to comply with Section 62 of the rules and regulations adopted by the Department of Public Safety with reference to the display of fireworks?

By Her Attorney, Oliver B. Di Cecca.

(Filed May 18, 1928.)

On the eighteenth day of July, A. D. 1928, the defendant, by consent of the plaintiff, filed the following answers to said interrogatories, to wit:

COMMONWEALTH OF MASSACHUSETTS,
Middlesex, ss:

SUPERIOR COURT

BEATRICE RICCI, p. p. a.,

vs.

MARIO MOGLIANI, alias —— ——

DEFENDANT'S ANSWERS TO PLAINTIFF'S INTERROGATORIES

1. a. Mario Mogliani.

b. Twenty-eight years of age.

c. At Centredale, Rhode Island.

d. During the past five years, my place of residence has been at various times at South Weymouth, Dedham, Boston and 482 Ferry Street, Everett, in the Commonwealth of Massachusetts.

e. My present occupation is the manufacturing, selling and displaying of fireworks.

f. My occupation on September 26, 1927, was the manufacturing, selling and displaying of fireworks.

g. My occupation during the past fire years was the manufacturing, selling and displaying of fireworks.

h. My place of business at the present time is Centredale, Rhode Island.

[fol. 124] i. My place of business during the past five years was Centredale, Rhode Island.

2. Yes.

a. I have engaged in the business of manufacturing fireworks at Napi, Italy, Berkley, Rhode Island and Centredale, Rhode Island.

b. I have engaged in the business of manufacturing fireworks for twelve years.

c. The type of fireworks that I have manufactured are the type commonly used for exhibition purposes.

d. I have for twelve years been employed and connected with the manufacture of fireworks. During the past two years I have been the owner and have operated a plant for the manufacture of fireworks at Centredale, Rhode Island.

e. I have not engaged in the manufacture of fireworks in the Commonwealth of Massachusetts and have not applied for a certificate of competency.

3. Yes.

a. I have displayed fireworks at East Boston June 13, 1927, Winchester August 15, 1927, Peabody July 4, 1927, Winchester July 4, 1927, Everett September 26, 1927, and at divers other times and places in the states of Connecticut, Massachusetts, New York, New Hampshire, Rhode Island and Vermont.

b. Yes.

c. All the men employed by me have more than three years experience in displaying fireworks.

4. Fireworks were displayed by my agents near Kelvin Street, Everett, Massachusetts, on September 26, 1927.

a. The fireworks displayed at Kelvin Street, Everett, were manufactured by my employees in my plant at Centredale, Rhode Island. They consisted of candles, wheels, bombs, fountains and set pieces.

b. I was not present and did not personally supervise the exhibition.

[fol. 125] c. Michael Vallanti and Fred Vallanti of 106 Ethan Street, Providence, Rhode Island, and Anthony Natale, of Centredale, Rhode Island, and Toni Rocci of East Boston.

d. The chemicals used in the manufacture of the fireworks were: Powdered Potassium Nitrate, Paris Green, Black Antimony, Dark Aluminum, Yellow Dextrine, Blue Vitriol, Potassium Chlorate, Powdered Strontium Nitrate, Powdered Orange Shellac, Light Aluminum, Superfine Flour Sulphur, Borium Chlorate, White Aluminum, White Rosin, Sugar of Milk.

5. I refuse to answer being advised by my attorneys that the question is irrelevant and immaterial.

6. I refuse to answer upon advice of my attorneys that the question is irrelevant and immaterial and calls for a conclusion of law.

7. I refuse to answer upon the advice of my attorneys for the reasons set forth in 5 and 6.

8. I refuse to answer upon the advice of my attorneys.

9. Yes.

10. a. Beatrice Ricci of 17 Cleveland Avenue, Everett, was the only person injured.

b. The plaintiff approached too near the flash pin wheel and was struck by a flash discharged from the wheel.

c. See answer to 10-B.

d. The piece of foreworks by which the plaintiff was injured was a flash pin wheel placed horizontally on a pole. It revolves and discharges a swirm of snakes and at intervals discharges a flash or ball of fire while in action.

11. No.

12. a. No.

b. None of the set pieces exploded. There were three such pieces displayed.

c. See answer to 10-d.

d. None of the set pieces burned or exploded improperly. [fol. 126] e. The set pieces are attached to a pole which is set into the ground.

13. I refuse to answer this question on the ground that either a yes or no answer would be false and a true answer would depend upon factors not stated in the question.

14. None of the bombs or set pieces set off at said exhibition burned or exploded improperly. Some of the spectators refused to heed the pleadings and warnings of the men in charge to keep back and approached too near the pieces while burning. This fact accounts for pieces of fire being thrown among the spectators.

15. Yes.

16. Fireworks were exploded in a large field which on one side borders upon Kelvin Street. The field is not in, but borders upon a residential district.

17. Our contract for the display provided that the committee for whom the display was given should provide police officers to keep back the spectators and one man was employed by me to warn the spectators and keep them from encroaching upon the danger area.

18. Fifty feet.

19. No.

20. Fifty feet.

21. About 10 p. m.

22. See answer to 17.

Mario Mogliani.

COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

July 18, 1928.

Then personally appeared Mario Mogliani and made oath that the above answers subscribed by him are true.

Before me—

G. K. Richardson, Notary Public.

July 18, 1928.

This may be filed late.

Oliver B. Di Cecca, Atty. for Plff.

(Filed July 18, 1928.)

[fol. 127] The cause afterwards submitted to a jury, sworn according to law to try the same, who, on the third day of March, A. D. 1930, returned their verdict therein upon oath, that is to say, they found for the plaintiff and assessed damages in the sum of ten thousand dollars. Thereupon, on the fifth day of said March, the defendant filed a motion for new trial, to wit:

Now comes the defendant and moves the Court, after verdict and before judgment, to set aside said verdict and grant a new trial, and assigns as reason therefor that the damages awarded the plaintiff by the jury were excessive.

By His Attorneys, Dallinger & Stearns.

On the twenty-ninth day of March, A. D. 1930, the Court filed the following Order on said motion for new trial, to wit:

In said action, the defendant having filed a motion that the verdict be set aside and for a new trial, for the reason, among others, that the said verdict is excessive, after due notice to the plaintiff and a hearing on said motion, the Court adjuges that the verdict as to the amount of the damages is excessive by the amount of thirty-five hundred dollars; and it is ordered that unless the plaintiff within ten days from the entry of this order, shall remit from the amount of the verdict said sum of thirty-five hundred dol-

lars, leavng the said verdict to be and stand for the sum of sixty-five hundred dollars, the verdict is set aside

Philip J. O'Connell, J. S. C.

On the seventh day of April, A. D. 1930, the plaintiff remitted the sum of thirty-five hundred dollars, and agreed that the verdict may stand at sixty-five hundred dollars.

And now, on this tenth day of April, A. D. 1930, the following Waiver of Appeal and Agreement for Judgment is filed, to wit:

WAIVER OF APPEAL AND AGREEMENT FOR JUDGMENT

In said action the right of appeal or to file exceptions is [fol. 128] hereby waived and it is agreed that judgment may be entered forthwith and execution issued immediately.

Dallinger & Stearns, Attorneys for Defendant.
Oliver B. Di Cecca, Attorney for Plaintiff.

It is therefore, on this said tenth day of April, A. D. 1930, considered by the Court that the said Beatrice Ricci recover against the said Mario Mogliani, sometimes known as Mariano Mogliani, the sum of six thousand five hundred forty dollars and eight cents damage, and costs of suit taxed at one hundred ten dollars and forty cents.

Execution issued April 10, 1930.

All which premises we have held good by the tenor of these presents to be exemplified.

In testimony whereof, we have caused the seal of our said Superior Court to be hereunto affixed.

Witness Walter Perley Hall, Esquire, Chief Justice of our said Superior Court, at Cambridge, this eleventh day of October in the year of our Lord one thousand nine hundred and thirty.

Ralph N. Smith, Clerk. (Seal.)

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EXHIBIT 9

COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

[L. S.]

I, Wilfred Bolster, Chief Justice of the Municipal Court of the City of Boston, in said County and Commonwealth,

Do certify that William F. Donovan, Esquire, whose signature is affixed to the papers hereunto annexed, is Clerk of said Court, within and for the County of Suffolk, for civil business, and hath the keeping of the files, records, and pro- [fol. 129] ceedings of said Court, within and for said County, for civil business; Also, of the files, records, and proceedings of the late Justices' Court of the County of Suffolk, and of the late Police Court of the City of Boston, for civil business, in the County and Commonwealth aforesaid; that he is, by Law, the proper person to make out and to certify copies of the files, records, and proceedings of said several Courts; that full faith and credit are and ought to be given to his acts and attestations done as aforesaid; and that his attestation to the paper hereunto annexed is in due form.

In Testimony Whereof I have hereunto set my hand, and caused the seal of the said Municipal Court of the City of Boston, to be hereunto affixed this eighth day of September, in the year of our Lord one thousand nine hundred and thirty.

Wilfred Bolster, Chief Justice of the Municipal Court of the City of Boston.

Commonwealth of Massachusetts,
Suffolk, ss:

I, William F. Donovan, Clerk of the Municipal Court of the City of Boston, holden at said Boston, within our County of Suffolk, for civil business, do certify, that Wilfred Bolster, Esquire, whose signature is affixed to the Certificate hereto annexed, is, and was at the time of affixing said signature, Chief Justice of the said Municipal Court of the City of Boston, duly commissioned and qualified as such, and acting at the time in his official capacity and that full faith and credence are, and ought to be given to his Acts and Attestations done as aforesaid, and that his signature to the Certificate annexed is genuine.

In Testimony Whereof I have hereunto set my hand and affixed the Seal of said Municipal Court of the City of Boston, at Boston aforesaid, this eighth day of September in the year of our Lord, one thousand nine hundred and thirty.

William F. Donovan, Clerk. (Seal.)

[fol. 130] COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

At the Municipal Court of the City of Boston, holden at said Boston, within the County of Suffolk, for civil business on the twenty-sixth day of April A. D., 1930.

JOHN W. HAIGIS, Treasurer and Receiver General of the Commonwealth of Massachusetts, Plaintiff,

vs.

AMERICAN SURETY COMPANY OF NEW YORK, Defendant

The Plaintiff appears and enters his action in the words following, to wit:

COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

To the sheriffs of our several counties or their deputies or any constable of any city or town within our said Commonwealth, Greeting:

[L. S.]

We Command you to attach the goods or estate of American Surety Company of New York, a corporation duly organized under the laws of the State of New York, and having a usual place of business in Boston in our County of Suffolk to the value of fifteen thousand ($15,000.00) Dollars; and summon the said Defendant (if it may be found in your precinct,) to appear before our Justices of the Municipal Court of the City of Boston, to be holden at Boston, within our County of Suffolk, for civil business, on Saturday, the twenty-sixth day of April, A. D. 1930, at nine of the clock in the forenoon; then and there to answer to John W. Haigis, Treasurer and Receiver General of the Commonwealth of Massachusetts, who brings this action for the benefit and use of Beatrice Ricci, of Everett, in our County of Massachusetts, plaintiff, in an action of contract to the damage of the said Plaintiff, (as he say) the sum of fifteen thousand ($15,000.00) Dollars, as shall then and there appear, with other due damages. And have you there this Writ with your doings therein.

[fol. 131] Witness Wilfred Bolster, Esquire, at Boston aforesaid, the eighteenth day of April, in the year of our Lord one thousand nine hundred and thirty.

William F. Donovan, Clerk.

Upon which is the following, to wit:

Boston, Mass., April 18, 1930.

Due and sufficient service of the within writ is hereby accepted in behalf of the defendant.

Hutchins & Wheeler, Attorneys for Defendant.

And at the time of the entry of said action the said plaintiff files his declaration, the same being in the words following, to wit:

"1. The plaintiff says that one Mario Mogliani as principal and the defendant as surety, on the eighteenth day of April, 1927, executed a certain bond which was duly filed with the Treasurer and Receiver General of the Commonwealth of Massachusetts, a copy of which is annexed hereto, marked "A", which was conditioned on the payment by said Mario Mogliani of any judgment obtained in an action brought against said Mario Mogliani for discharging, firing off, exploding or displaying fireworks at any public exhibition or exhibitions thereof, for or on account of any loss, damage or injury resulting to persons or property by reason of the said discharging, firing off, exploding or displaying of said fireworks at said public exhibitions or exhibitions; provided that said judgment was obtained in an action brought within a period of twelve months following the date of the public exhibition at which the cause of said action is alleged to have occurred.

2. That said Mario Mogliani discharged, fired off, exploded or displayed fireworks at a public exhibition in the City of Everett, Massachusetts, on the twenty-sixth day of September, 1927, and in consequence of the carelessness and negligence of said Mario Mogliani in so discharging, firing off, exploding or displaying fireworks, Beatrice Ricci, for whose benefit and use, and at the costs and expense of [fol. 132] whom, this action is brought, suffered serious personal injuries.

3. That said Beatrice Ricci, on the twelfth day of April, 1928, by Nicola Ricci, her father and next friend brought

an action against said Mario Mogliani for the losses, damages or injuries which she sustained or ensued to her by reason of said public exhibition, in the Superior Court for the County of Middlesex, and on the tenth day of April, 1930, obtained judgment against said Mario Mogliani for the losses, damages or injuries aforesaid ensuing to her by reason of the discharging, firing off, exploding or displaying fireworks at said public exhibition, in the sum of six thousand five hundred forty dollars and eight cents ($6,540.08) damages and one hundred ten dollars and forty cents ($110.40) costs of Court, making a total of six thousand six hundred fifty dollars and forty eight cents ($6650.48), for which amount execution duly issued from said Court in favor of said Beatrice Ricci and against said Mario Mogliani, on the tenth day of April, 1930.

4. That a demand was made on said Mario Mogliani for the payment of the amount of said execution on the seventeenth day of April, 1930, but said Mario Mogliani failed to pay and has not since paid said judgment or execution or any part thereof.

Wherefore the plaintiff says that the defendant owes the plaintiff fifteen thousand dollars ($15,000.00), the penal sum of said bond."

Copy Annexed.

Copy

The Commonwealth of Massachusetts, Department of Public Safety, Division of Fire Prevention, State House, Boston, Mass.

(General Laws, Chapter 148, as Amended by St. of 1921, Chapter 500)

[fol. 133] SURETY BOND

Discharging, Firing-off, Exploding, or Displaying Fireworks at any Public Exhibition or Exhibitions

Know All Men by these Presents, that we Mario Mogliani doing business as Centredale Fireworks Company of Centredale, Town of North Providence in the county of

Providence in the State of Rhode Island, as Principal, and American Surety Company of New York as surety, are holden and stand firmly bound unto the Treasurer and Receiver General of the Commonwealth of Massachusetts in the just sum of fifteen thousand dollars to be paid to the said Treasurer and Receiver General or his successor or successors in office, to which payment well and truly to be made, we hereby jointly and severally bind ourselves, our respective heirs, executors and administrators, successors and assigns, firmly by these presents.

The Condition of this Obligation is such that if the said Mario Mogliani d/b as Centredale Fireworks Company his heirs, executors and administrators, successors and assigns, shall pay any judgment obtained in an action brought against the said Principal for discharging, firing-off, exploding or displaying fireworks at any public exhibition or exhibitions thereof, for or on account of any loss, damage or injury resulting to persons or property by reason of the said discharging, firing-off, exploding or displaying of said fireworks, at said public exhibition or exhibitions; provided that said judgment is obtained in an action brought within a period of twelve months following the date of the public exhibition or exhibitions, at which the cause of said action is alleged to have occurred, then this obligation shall be void, otherwise it shall remain in full force and effect.

In Witness Whereof, we hereunto set our hands and seals, this 18th day of April A. D. 1927.

Mario Mogliani (Seal), d/b as Centredale Fireworks Company (Seal.) American Surety Company of [fol. 134] New York, by T. J. Gargan, Resident Vice President.

Attest: W. I. Whitley, Res. Asst. Secretary. (Seal.)

Signed, sealed, and delivered in presence of us: M. R. Javers, R. D. Cherry, H. F. Roberts.

Providence, R. I., ss:

Then personally appeared the above-named principal on this 18th day of April, 1927 and acknowledged the foregoing instrument to be his free act and deed.

Before me—

Raymond Buss, Notary Public. (Notary's Seal.)

The amount of the bond approved.

Timothy C. Murphy, Acting State Fire Marshal.

Approved as to Surety.

K. H. Oliver, Deputy Treasurer and Receiver General.

General Laws, Chapter 148 (as Amended by Acts of 1921, Chapter 500)

Section 57 (c). No person engaged in the business of displaying or exhibiting fireworks shall, by himself or his agents, discharge, fire off, explode or display fireworks at any public exhibition or exhibitions thereof unless he has on file with the state treasurer a bond running to the state treasurer with a surety or sureties approved by him for the penal sum of fifteen thousand dollars, and for such additional penal sum as the state fire marshal shall determine to be necessary to cover the losses, damages or injuries that might ensue to persons or property by reason of said public exhibition or exhibitions. The bond shall be conditioned upon the payment of any judgment obtained in an action [fol. 135] brought against said person so discharging, firing off, exploding or displaying fireworks at any public exhibition or exhibitions thereof, for or on account of any loss, damage or injury resulting to persons or property by reason of the said discharging, firing off, exploding or displaying of said fireworks at said public exhibition or exhibitions; provided that said judgment was obtained in an action brought within a period of twelve months following the date of the public exhibition at which the cause of said action is alleged to have occurred.

Section 57 (d). Action on a bond filed under the provisions of the preceding section may be brought by any person or persons holding such judgment and may be brought by such person or persons in the name of the state treasurer but for the benefit and use and at the cost and expense of such person or persons so bringing the said action.

And the further consideration of said action is thence adjourned to the twenty-ninth day of April, A. D. 1930.

And on the thirtieth day of April, A. D. 1930, an agreement for judgment was filed, the same being in the words following to wit:

"It is agreed that judgment may be entered in the above entitled action for the plaintiff for the sum of fifteen thousand dollars ($15,000), the penal sum of the bond in suit, and that execution may issue thereon in favor of the plaintiff in said action for the use and benefit of Beatrice Ricci of Everett in our County of Middlesex, in the sum of sixty-six hundred fifty-three and 78/100 dollars ($6653.78) damages without costs.

Oliver B. Di Cecca, Attorneys for the Plaintiff.
Hutchins & Wheeler, Attorneys for the Defendant."

And the further consideration of said action is thence adjourned to the second day of May A. D. 1930.
[fol. 136] And on the said second day of May it is therefore considered by said Court, that he the said Plaintiff, recover against the said Defendant the sum of sixty-six hundred and fifty-three dollars and seventy eight cents, damage, and costs of suit, taxed at — dollars.

A true copy. Attest:

William F. Donovan, Clerk.

Judg't date: May 2, 1930. Dam.: $6,653.78. Costs: $6,653.78.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said Municipal Court of the City of Boston, at Boston, the eighth day of September in the year of our Lord one thousand nine hundred and thirty.

William F. Donovan, Clerk. (Seal.)

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EXHIBIT 10

Suffolk Registry of Deeds

Marotta et ux.

to

Muollo

Book 5171, Page 262

We, Arcangelo Marotta and Teresa Marotta, sometimes called Teresina Marotta, husband and wife, of Boston, Suffolk County, Massachusetts, for consideration paid, grant

to Pellegrino Muollo of said Boston, with Quitclaim Covenants the land and buildings thereon and all easements and all appurtenances and easements to the same belonging comprising three estates two situated in said Boston and one in Winthrop in said County of Suffolk and said estates are separately bound as follows: Southeasterly on North Street in said Boston, thirty eight and 27/100 feet; Southwesterly on Lewis Street, forty seven and 69.100 feet; Northwesterly by land now or late of Brophy twenty two and 59/100 feet; and Northeasterly by land now or late of Currants forty-five and 25/100 feet more or less. Containing some 1181 and 73/100 square feet of land, see deed recorded with Suffolk Registry Book 4980, page 233. Westerly on Pleasant Street in said Winthrop, one hundred twenty nine 30/100 feet; Northerly by two courses by land now or late of Thompson one hundred fifty four and 76/100 [fol. 137] feet; Easterly by land now or formerly of Dunton seventy eight and 55/100 feet; and Southerly by land of Clark Weston and others, two hundred and twelve feet. Containing some 16,910 square feet of land, see deed recorded with Suffolk Registry of Deeds, book 4158, page 342. Northwesterly on North Street, in said Boston, forty eight and 5/10 feet; Northeasterly on Lewis Street about forty six feet and 4/10 feet; Southeasterly on Fulton Street about forty five feet two inches; and southwesterly by land now or late of George W. Ware by a broken line running through the middle of the partition wall, standing in part on premises hereby conveyed and partly on land now or late of Ware, about fifty feet (50′2″) two inches. For description see further deed recorded with Suffolk Registry Libro 3173, page 324. Subject to all incumbrances of record if any. We the grantors husband and wife, release to said grantee all rights of dower curtesy and homestead and other interests therein. Witness our hands and seals this eighteenth day of March 1930. Arcangelo Marotta his X mark Teresa Marotta her X mark. Witnesses to signatures and to mark of T. M. and A. M. Frank M. Zottoli. Commonwealth of Massachusetts Suffolk ss. Boston, March 18th, 1930 Then personally appeared the above named Arcangelo Marotta and Teresa Marotta and acknowledged the foregoing instrument to be their free act and deed, before me, Frank M. Zottoli, Jus-

tice of the Peace. My commission expires Sept. 30th, 1934, March 19, 1930. At one o'clock and thirty five minutes P. M. Received, Entered, and Examined.

A true copy from the records of Deeds for the County of Suffolk Book 5171, Page 262.
Attest:

Wm. T. A. Fitzgerald, Register.

The Commonwealth of Massachusetts, Office of the Secretary

Frederick W. Cook, Secretary

Boston, Oct. 30, 1930.

I hereby certify that William T. A. Fitzgerald is the Reg- [fol. 138] ister of Deeds for Suffolk County, duly elected for and within this Commonwealth, and to his acts, as such, full faith and credit are and ought to be given, in and out of Court; and that the attestation affixed by him to the document to which this certification is attached is in due form.

In Testimony of which I have hereunto affixed the Great Seal of the Commonwealth the date above written.

F. W. Cook, Secretary of the Commonwealth. (Seal.)

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Exhibit 11

Suffolk Registry of Deeds

Muollo

to

Dello Russo

Book 5171, Page 263

I, Pellegrino Muollo, of Boston, Suffolk County Massachusetts, for consideration paid, grant to Nicola Dello Russo of Medford, in the County of Middlesex in said Commonwealth, with Mortgage Covenants to secure the payment of twenty thousand dollars in three years with

six (6%) per centum interest per annum, payable semi-annually as provided in a note of even date, the land with the buildings thereon standing, and all easements and appurtenances to the same belonging, bounded and described as follows: Southeasterly on North Street in said Boston, about (38.27) thirty eight and 27/100 feet; Southwesterly on Lewis Street forty seven and 69/100 (47.69) feet; Northwesterly on land now or late of Brophy about twenty two 59/100 feet; and Northeasterly on land formerly of Currants about forty five 25/100 feet. Being the same premises conveyed to me by deed of Arcangelo Marotta et ux to be recorded with said Suffolk Registry of Deeds. Subject to a mortgage held by the Boston Five Cents Savings Bank upon which 5,000 remains due. This mortgage is upon the statutory condition, for any breach of which the mortgagee shall have the statutory power of sale. I, Pellegrino Muollo and Sabatina Muollo, wife of said mortgagor release to the mortgagee all rights of dower and homestead and other interests in the mortgaged premises. [fol. 139] Witness our hands and seals this eighteenth day of March 1930. Pellegrino Muollo, Sabatina Muollo. Witness to signatures Frank M. Zottoli. Commonwealth of Massachusetts Suffolk ss. Boston, March eighteenth 1930. Then personally appeared the above named Pellegrino Muollo and acknowledged the foregoing instrument to be his free act and deed, before me, Frank M. Zottoli, Justice of the Peace. My commission expires Sept. 30, 1930. March 19, 1930. At one o'clock and thirty five minutes P. M. Received, Entered, and Examined.

A true copy from the records of Deeds for the County of Suffolk Book 5171, Page 263.

Attest:

Wm. T. A. Fitzgerald, Register.

The Commonwealth of Massachuetts, Office of the Secretary

Frederick W. Cook, Secretary

Boston, Oct. 30, 1930.

I hereby certify that William T. A. Fitzgerald is the Register of Deeds for Suffolk County duly elected for and

within this Commonwealth, and to his acts, as such, full faith and credit are and ought to be given, in and out of court; and that the attestation affixed by him to the document to which this certification is attached is in due form.

In Testimony of which I have hereunto affixed the Great Seal of the Commonwealth the date above written.

F. W. Cook, Secretary of the Commonwealth. (Seal.)

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[fol. 140] EXHIBIT 12

Suffolk Registry of Deeds

Muollo

to

Grella

Book 5171, Page 264

I, Pellegrino Muollo, of Boston, Suffolk County, Massachusetts, for consideration paid, grant to Marciano Grella of Boston aforesaid, with Mortgage Covenants to secure the payment of the sum of eight thousand dollars in three years with six (6%) per centum interest per annum, payable semi-annually as provided in a note of even date, the land in Winthrop with the buildings thereon and all appurtenances to the same belonging bounded and described as follows; Westerly on Pleasant Street in said Winthrop, Suffolk County, Massachusetts one hundred twenty nine and 30/100 feet; Northerly on land now or formerly of Thompson in two courses together measuring one hundred fifty four and 76/100 feet; Easterly on land now or late of Bunton, seventy eight and 55/100 feet; and Southerly on land of Clark, Weston and others, two hundred and twelve feet; Containing some 16,910 square feet of land. Being the same premises conveyed to me by deed of even date by Arcangelo Marotta to be herewith recorded and the same premises described in a deed from James J. Early to Teresina Marotta recorded with said Registry of Deeds, book 4156, page 342. This mortgage is upon the statutory condition, for any breach of which the mortgagee shall have the statutory power of sale. We, Pellegrino Muollo and Sabatina Muollo wife of said mortgagor release to the mortgagee all rights of dower and homestead and

other interests in the mortgaged premises. Witness our hands and seals this eighteenth day of March 1930. Pellegrino Muollo, Sabatina Muollo Witness to signature Frank M. Zottoli, Commonwealth of Massachusetts Suffolk ss. Boston, March 1930. Then personally appeared the above named Pellegrino Muollo and acknowledged the foregoing instrument to be his free act and deed before me, Frank M. Zottoli, Justice of the Peace. My commission expires [fol. 141] September 30th, 1934. March 19, 1930. At one o'clock and thirty five minutes P. M. Received, Entered, and Examined.

A true copy from the records of Deeds for the County of Suffolk, Book 5171, Page 264.

Attest:

Wm. T. A. Fitzgerald, Register.

The Commonwealth of Massachusetts, Office of the Secretary

Frederic W. Cook, Secretary

Boston, October 30, 1930.

I hereby certify that William T. A. Fitzgerald is the Register of Deeds for Suffolk County duly elected for and within this Commonwealth, and to his acts, as such, full faith and credit are and ought to be given, in an out of court and that the attestation affixed by him to the document to which this certification is attached is in due form.

In Testimony of which I have hereunto affixed the Great Seal of the Commonwealth the date above written.

F. W. Cook, Secretary of the Commonwealth. (Seal.)

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EXHIBIT 13

Suffolk Registry of Deeds

Muollo

to

Marotta, Tr.

Book 5171, Page 266

We, Pellegrino Muollo of Boston, Suffolk County, Massachusetts, for consideration paid, grant to Arcangelo

Marotta in his capacity of Trustee under a Declaration of Trust of even date and to be herewith recorded, and as such Trustee of Boston Suffolk County, Massachusetts, with Quitclaim Covenants the land and buildings thereon and all easements and all appurtenances and easements to the same belonging comprising three estates two situated in said Boston and one in Winthrop in said County of Suffolk and said estates are separately bound as follows; Southeasterly on North Street in said Boston, thirty eight [fol. 142] and 27/100 feet; Southwesterly on Lewis Street, forty seven and 69.100 feet; Northwesterly by land now or late of Brophy twenty two and 59/100 feet; and Northeasterly by land now or late of Currants forty-five and 25/100 feet, more or less. Containing some 1181 and 73/100 square feet of land. See deed recorded with Suffolk Registry Book 4980, page 233. Westerly on Pleasant Street in said Winthrop one hundred twenty nine 30/100 feet; Northerly by two courses by land now or late of Thompson one hundred fifty four and 76/100 feet; Easterly by land now or formerly of Bunton seventy eight and 55/100 feet; and Southerly by land of Clark, Weston and others, two hundred and twelve feet. Containing some 16,910 square feet of land. See deed recorded with Suffolk Registry of Deeds, book 4158, page 342. Northwesterly on North Street, in said Boston, forty eight and 5/10 feet; Northeasterly on Lewis Street about forty six feet and 4/10 feet; Southeasterly on Fulton Street about forty five feet two inches; and Southwesterly by land now or late of George W. Ware by a broken line running through the middle of the partition wall, standing in part on premises hereby conveyed and partly on land now or late of Ware, about fifty feet (50′ 2″) two inches. For description see further deed recorded with Suffolk Registry Libro 3173, page 324. Subject to all incumbrances of record. Sabatina Muollo wife of said grantor release to said grantee all rights of dower and homestead and other interests therein.

Witness our hands and seals this eighteenth day of March 1930.

Pellegrino Muollo, Sabatina Muollo.

Witness to signatures: Frank M. Zottoli.

COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

Boston, March eighteenth, 1930.

Then personally appeared the above-named Pellegino Muollo and acknowledged the foregoing instrument to be his free act and deed, before me—

Frank M. Zottoli, Justice of the Peace.

My commission expires Sept. 30th, 1930.

March 19, 1930.

At one o'clock and thirty five minutes P. M. Received, Entered, and Examined.

A true copy from the records of Deeds for the County of Suffolk, Book 5171, Page 266.
Attest:

Wm. T. A. Fitzgerald, Register.

[fol. 143] The Commonwealth of Massachusetts, Office of the Secretary

Frederic W. Cook, Secretary

Boston, Oct. 30, 1930.

I hereby certify that William T. A. Fitzgerald is the Register of Deeds for Suffolk County duly elected for and within this Commonwealth, and to his acts, as such, full faith and credit are and ought to be given, in and out of Court; and that the attestation affixed by him to the document to which this certification is attached is in due form.
In Testimony of which, I have hereunto affixed the Great Seal of the Commonwealth the date first above written.

F. W. Cook, Secretary of the Commonwealth.
(Seal.)

## Exhibit 14

## Suffolk Registry of Deeds

## Marotta, Tr.

## Declaration of Trust. Book 5171, Page 265

Commonwealth of Massachusetts:

### Declaration of Trust

I, Arcangelo Marotta, husband of Teresa Marotta, sometimes called Teresina Marotta, of Boston, Suffolk County, Massachusetts, do hereby declare that I hold the land with the buildings thereon together with all easements, appurtenances and privileges to the same belonging and together with any other property, real personal or mixed which I may hereafter acquire as trustee under this Declaration of Trust, said land being situated in the Town of Winthrop bounded and described as follows; Westerly by Pleasant Street, one hundred twenty nine and 30/100 (129.30) feet; northerly in two courses by land now or formerly of Thompson one hunderd fifty one and 76/100 (151.76) feet; easterly by land now or formerly of Bunton, seventy eight and 55/100 (78.55) feet; southerly by land now or formerly of Weston two hundred and twelve (212) feet. Containing 16,910 square feet of land and being the same premises described in a deed recorded with Suffolk Deeds, book 4156, [fol. 144] page 342, In Trust as follows; 1. To support and maintain the children of the aforesaid spouses (viz; Arcangelo Marotta and Teresa Marotta) and their children's children but only as the said declarant in his sole discretion may see fit to do. 2. Upon the death of the declarant, the said Teresa Marotta shall succeed as trustee. 3. Upon the death of Teresa Marotta or in the event that at the death of the declarant the said Teresa Marotta shall have predeceased the declarant, the eldest living child of the said spouses shall succeed as trustee but only in the event that the youngest child of the said spouses shall not have attained the age of 21 years. 4. The said Trust shall terminate after the death of the said spouses if at the death of the survivor of the said spouses their youngest child shall have attained the age of 21 years. The trust shall also terminate when their youngest child shall have attained the

age of 21 years; at which time the Trust Estate shall be distributed share and share alike among their children, and any child or children of any deceased child shall be entitled to their parent's share proportionately as by right of representation. 5. The eldest living child of the said spouses succeeding the declarant or the said Teresa Marotta as trustee shall not alienate the Trust Estate or any part thereof, but may administer the same with due diligence and mortgage the same, paying the then current rate of interest for similar loans when the same is made necessary in replacing some mortgage or mortgages and shall have power to extend any and all mortgages upon the prevailing rate of interest as aforesaid. 6. The declarant and his succeeding trustee or trustees, except as hereinbefore provided, shall have power to alienate, sell or mortgage each in their or his or her sole discretion any part or the whole of the Trust Estate which may be held under this Declaration of Trust or which may be hereafter acquired under this Declaration of Trust, and may invest and reinvest any and all of its funds, and may take, make, assign or discharge any mortgage, and may execute any and all documents pertaining to or relating to the said Trust Estate. [fol. 145] The purchaser or purchasers from any of the said trustees, any mortgagee or mortgagees, as to all or part of the said Trust Estate, whether now held or hereafter acquired under this Declaration of Trust, are not to be responsible for the application of the purchase money on account of any sale, mortgage or investment of the Trust Estate. In Witness Whereof I hereto set my hand and seal this fifteenth day of March A. D. 1930. Arcangelo Marotta, his X mark Witness to signature by mark of A. M. Frank M. Zottoli. Commonwealth of Massachusetts Suffolk ss. Boston, March 15th, 1930. Then personally appeared Arcangelo Marotta and acknowledged the foregoing Declaration of Trust by him subscribed to be his free act and deed, before me, Frank M. Zottoli, Justice of the Peace. My commission expires Sept. 30, 1934. March 19, 1930. At one o'clock and thirty five minutes P. M. Received, Entered, and Examined.

A true copy from the records of Deeds for the County of Suffolk Book 5171 Page 265.

Attest:

Wm. T. A. Fitzgerald, Register.

**The Commonwealth of Massachusetts, Office of the Secretary**

**Frederic W. Cook, Secretary**

**Boston, Oct. 30, 1930.**

**I hereby certify that William T. A. Fitzgerald is the Register of Deeds for Suffolk County, duly elected for and within this Commonwealth, and to his acts, as such, full faith and credit are and ought to be given, in and out of Court; and that the attestation affixed by him to the document to which this certification is attached is in due form.**

**In Testimony of which, I have hereunto affixed the Great Seal of the Commonwealth the date above written.**

**F. W. Cook, Secretary of the Commonwealth. (Seal.)**

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[fol. 146] EXTRACT FROM EXHIBIT 15

It is agreed that the material portion of Exhibit 15 are as follows:

"Extract from the Record Book of the Board of Trustees of the American Surety Company of New York

The first meeting of the Board of Trustees of the American Surety Company of New York after the annual Stockholders' meeting, was held at the office of the Company, No. 100 Broadway, New York City, on Tuesday, January 18, 1927, at 12 o'clock noon.

The Secretary read the report of the Nominating Committee as follows:

To the Board of Trustees, American Surety Company of New York.

GENTLEMEN: The Committee appointed by the Executive Committee of this Company, at their meeting held Tuesday, November 16, 1926, for the purpose of nominating * * * Officers of the Company, * * * for the ensuing year and until their successors are elected, beg leave to report as follows:

We nominate for"—

then begins a long printed list covering several pages, beginning with the words "Chairman of the Board—F. W.

Lafrentz," and then on the second page and succeeding pages are three columns headed, first, "Place," and then follow the names of towns and cities; second, "Resident Vice Presidents," and then follows a list of names; third, "Resident Assistant Secretaries," and then follows a list of names, and under "Providence, R. I.," under the "Resident Vice Presidents," appears the name of Raymond Buss; and under "Boston, Mass.," appear the names of T. J. Gargan as Resident Vice President and W. I. Whitley as Resident Assistant Secretary.

And the record goes on, at the end of this list of names:

"Whereupon, it was—

[fol. 147] "Resolved, That the Secretary be authorized to cast one ballot, on behalf of the Trustees present, for the members of the Executive Committee, Finance Committee, Committee on Accounts, Committee on Capital Box, Officers and Counsel, as recommended by the Nominating Committee, for the ensuing year and until their successors are elected: which was done, and thereupon the aforementioned persons were declared to have been unanimously elected to their respective offices for the ensuing year and until their successors are elected.

"The following resolution was adopted:

"Resolved, That the President, the Vice Presidents and the Resident Vice Presidents be, and they hereby are, and each of them is hereby, authorized and empowered to execute and deliver any and all surety bonds and undertakings for, or on behalf of this Company, in its business and in accordance with its Charter; such bonds and undertakings to have in every instance, however, the seal of this Company affixed thereto, and to be attested by the signature of the Secretary, an Assistant Secretary, or a Resident Assistant Secretary of this Company."

Then it is dated.

"State of New York,
County of New York, ss:

I, I. C. Clark, Assistant Secretary of the American Surety Company of New York, do hereby certify that I have compared the foregoing extracts and transcripts, from the Record Book of the Board of Trustees of the American

Surety Company of New York, with the original record of said Board, and that the same are correct extracts and transcripts therefrom as they appear of record and are set forth and contained in said Record Book; and I further certify that I have compared the foregoing resolutions with the originals thereof, as recorded in the Minute Book of said Company, and do certify that the same is a correct and [fol. 148] true transcript therefrom, and of the whole of said original resolutions; and that the said resolutions have not been revoked or rescinded.

Given under my hand and the seal of the Company, at the City of New York, this January 20, 1927.

I. C. Clark, Assistant Secretary."

(Here follows Exhibit 16, side folios 149 and 150)

Ex Exhibit - 16.

FOREIGN

The Commonwealth of Massachusetts

DEPARTMENT OF BANKING AND INSURANCE

No. 35420

DIVISION OF INSURANCE

Boston, July 1, 1927

This Certifies, That, in consideration of a fee of $2.00, License to Thomas J. Gargan of Roxbury, Mass. as Agent for the American Surety ~~Insurance~~ Company of New York City, is hereby renewed and continued in force for the period of one year from date hereof, unless sooner revoked in accordance with law.

THIS LICENSE protects only the person or firm named therein. A clerk or employee must have a separate license if he acts for his employer in soliciting or negotiating business outside the office.

Wesley E. Monk
Commissioner of Insurance

Per W. M. C.

178

122A
149-150

[fol. 151] **Exhibit 17**

**Suffolk Registry of Deeds**

**Parker et ux.**

**to**

**Marotta et al.**

**Book 3141, Page 318**

Know all men by these presents that we, Chester Parker and Ethel W. Parker, his wife, in her right of Lancaster in the County of Worcester in the Commonwealth of Massachusetts in consideration of one dollar and other good and valuable considerations paid by Teresa Marotta wife of Arcangelo Marotta of Boston in the County of Suffolk in said Commonwealth the receipt whereof is hereby acknowledged, do hereby grant, remise, release and forever quitclaim unto the said Teresa Marotta and her heirs and assigns a certain parcel of land with the buildings thereon situate and now numbered 268-272 on North Street in said Boston and bounded and described as follows: Southeasterly on said North Street about thirty-eight 27/100 feet; Southwesterly on Lewis Street forty-seven 69/100 feet; northwesterly on land now or formerly of Brophy about twenty-two 59/100 feet, and northeasterly on land formerly of Currants about forty-five 25/100 feet; Or however otherwise said premises may be bounded or described and be all or any of said measurements more or less. Being the premises conveyed to the said Ethel W. Parker by Katharine W. Harding by deed dated October 1, 1902, duly recorded Lib. 2853, page 599. The premises are conveyed subject to two mortgages dated December 22, 1905, given by the grantors one for nine thousand dollars to Amory Eliot and another trustees duly recorded Lib. 3094, page 65 and the other for forty-five hundred dollars to Edward B. Bayley duly recorded lib. 3094, page 68, and subject also to the taxes to be assessed thereon as of May 1, 1906, which taxes the grantee is to pay. The premises are conveyed subject also to a lease given to one Frank Belemonte, dated March 1902, expiring by extension January 1, 1908, which is hereby assigned to the grantee. To have and to hold the above described premises with all the rights, easements, privileges and appurtenances thereto belonging to the said

[fol. 152] Teresa Marotta and her heirs and assigns to their own use and behoof forever. And we the said grantors for ourselves and our heirs executors and administrators do covenant with the said grantee and her heirs and assigns that the above described premises are free from all incumbrances made by us except as aforesaid and that we will & our heirs executors and administrators shall warrant and defend the same to the said grantee and her heirs and assigns against the lawful claims and demands of all persons claiming by through or under us except as aforesaid, but against none other.

In Witness Whereof we, the said Chester Parker and Ethel W. Parker, hereunto set our hands and seals this tenth day of July, in the year one thousand nine hundred and six.

Chester Parker, Ethel W. Parker and each a seal.

Signed sealed and delivered in presence of —— ——.

Commonwealth of Massachusetts,
Suffolk, ss:

July 10, A. D. 1906.

Then personally appeared the above-named Chester Parker and acknowledged the foregoing instrument by him subscribed to be his free act and deed, before me

Herbert Parker, Justice of the Peace.

July 10, 1906.

At eleven o'clock and eighteen minutes A. M. received, entered, and examined.

Attest:

Thos. F. Temple, Reg.

A true copy from the Records of Deeds for the County of Suffolk, Book 3141, Page 318.

Attest:

Wm. T. A. Fitzgerald, Register.

The Commonwealth of Massachusetts, Office of the Secretary

Frederic W. Cook, Secretary

Boston, Oct. 30, 1930.

I hereby certify that William T. A. Fitzgerald is the Register of Deeds for Suffolk County, duly elected for and

within this Commonwealth, and to his acts, as such, full faith and credit are and ought to be given, in and out of Court; and that the attestation affixed by him to the document to which this certification is attached is in due form.
[fol. 153] In Testimony of which, I have hereunto affixed the Great Seal of the Commonwealth the date above written.
F. W. Cook, Secretary of the Commonwealth (Seal.)

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EXHIBIT 18

Suffolk Registry of Deeds

Clark

to

Marotta

Book 3173, Page 324

Know all men by these presents that I, George L. Clark of Boston in the County of Suffolk in the Commonwealth of Massachusetts, in consideration of One Dollar and other valuable considerations paid by Teresa Marotta, wife of Arcangelo Marotta, of said Boston, the receipt whereof is hereby acknowledged, do hereby grant, remise, release and forever quitclaim unto the said Teresa Marotta her heirs and assigns, a certain parcel of land with the buildings thereon situated on Fulton North and Lewis Streets in said Boston, being the premises on which stand the stores numbered 142, 144 and 146 on said Fulton Street, and 247, 249 and 251 on said North Street, bounded: Northwesterly by said North Street about forty eight and 5/10 feet; Northeasterly by said Lewis Street, about forty six and 4/10 feet; Southeasterly by said Fulton Street about forty five feet and two inches; and Southwesterly by land now or late of George W. Ware by a broken line running through the middle of the partition wall standing partly on the granted premises and partly on said land now or late of Ware about fifty feet five inches. Being the same premises conveyed to George L. Clark, by Hyman M. Hillson and Elka Hillson, his wife, in her right by deed dated July 26, 1894 and recorded with Suffolk Deeds Book 2214, Page 502. To have and to hold

the above described premises, with all the rights, easements, privileges and appurtenances thereto belonging, to the said Teresa Marotta and her heirs and assigns, to their own use and behoof forever. And I the said grantor for myself and my heirs, executors and administrators, do covenant with [fol. 154] the said grantee and her heirs and assigns, that the above described premises are free from all incumbrances made by me and that I will and my heirs, executors and administrators shall warrant and defend the same to the said grantee and her heirs and assigns against the lawful claims and demands of all persons claiming by through or under me but against none other. And for the consideration aforesaid, I, Helen Augusta Clark wife of the said George L. Clark do hereby release unto the said grantee and her heirs and assigns all right of or to dower and homestead or other interest in the granted premises.

In Witness Whereof we, the said George L. Clark and Helen Augusta Clark, hereunto set our hands and seals this twenty seventh day of November in the year one thousand nine hundred and six.

George L. Clark, Helen Augusta Clark and each a seal.

Signed sealed and delivered in presence of —— ——.

COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

November 27, A. D. 1906.

Then personally appeared the above named George L. Clark and acknowledged the foregoing instrument by him subscribed to be his free act and deed, before me—

Herbert S. Riley, Justice of the Peace.

November 27, 1906.

At twelve o'clock and thirty one minutes P. M. received, entered, and examined.

Attest:

Thos. F. Temple, Reg.

A true copy from the Records of Deeds for the County of Suffolk, Book 3173, Page 324.

Attest:

Wm. T. A. Fitzgerald, Register.

The Commonwealth of Massachusetts, Office of the Secretary

Frederic W. Cook, Secretary

Boston, Oct. 30, 1930.

I hereby certify that William T. A. Fitzgerald is the Register of Deeds for Suffolk County, duly elected for and within this Commonwealth, and to his acts, as such, full faith and credit are and ought to be given, in and out of Court; and that the attestation affixed by him to the document to which this certification is attached is in due form.

[fol. 155] In Testimony of which I have hereunto affixed the Great Seal of the Commonwealth the date above written.

F. W. Cook, Secretary of the Commonwealth. (Seal.)

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EXHIBIT 19

Suffolk Registry of Deeds

[U. S. Revenue Stamps of the amount of $9.00 were affixed to this instrument and were canceled.]

Earley, Exor.,

to

Marotta

Book 4156, Page 342

I, James J. Earley, of Valley City in the State of North Dakota Executor of the Will of Susan A. Macgowan, late of Winthrop in the County of Suffolk and Commonwealth of Massachusetts deceased by the power conferred by said will duly filed in Suffolk County Probate Court Case No. 181,068 and every other power, for Nine Thousand ($9,000) Dollars paid, grant to Teresina Marotta wife of Arcangelo Marotta, of Boston, Mass., the land in said Winthrop, together with the buildings thereon, situated at 491 Pleasant Street, being further bounded and described as follows: Beginning at a point sixty five and ninety five hundredths (65.95) feet from the corner of Lincoln and Pleasant Streets in said Winthrop; thence North on said Pleasant

Street one hundred and twenty nine and thirty hundredths (129.30) feet; thence East by two courses, bounded on the North by land now or formerly owned by one Thompson, the first line ninety nine and fifty hundredths (99.50) feet; the second fifty five and twenty six hundredths (55.26) feet; thence South seventy-eight and fifty five hundredths (78.55) feet, bounded on East by land now or formerly owned by one Bunton; thence West two hundred and twelve (212) feet to the point of beginning, bounded on the South by land owned now or formerly by Clark, Washburn Weston and the heirs of Hannah E. Weston, and containing sixteen thousand nine hundred and ten (16,910) square feet of land more or less, being the same premises recorded in [fol. 156] Suffolk Deeds, book 3684, page 26. Subject to the taxes assessed April 1, 1919 and municipal liens and assessments, if any.

Witness my hand and seal this 1st day of May 1919.

James J. Earley, Executor as Aforesaid, and a Seal.

Walter Coop. J. J. Grest.

STATE OF NORTH DAKOTA,
County of Barnes, ss:

May 1-19, 1919.

Then personally appeared the above named James J. Earley and acknowledged the foregoing instrument to be his free act and deed, before me—

Walter Coop, Notary Public. Notary Public, Barnes County, North Dakota. My commission expires July 6th, 1923. And His Notarial Seal.

August 6, 1919, at two o'clock and fifty minutes P. M., received, entered, and examined.

A true copy from the records of Deeds for the County of Suffolk, Book 4156, Page 342.

Attest:

Wm. T. A. Fitzgerald, Register.

The Commonwealth of Massachusetts, Office of the Secretary

Frederic W. Cook, Secretary

Boston, Oct. 30, 1930.

I hereby certify that William T. A. Fitzgerald is the Register of Deeds for Suffolk County, duly elected for and

within this Commonwealth, and to his acts, as such, full faith and credit are and ought to be given, in and out of Court; and that the attestation affixed by him to the document to which this certification is attached is in due form.

In Testimony of which I have hereunto affixed the Great Seal of the Commonwealth the date first above written.

F. W. Cook, Secretary of the Commonwealth. (Seal.)

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[fol. 157] EXHIBIT 20

The Commonwealth of Massachusetts, Office of the Secretary

Boston, November 4, 1930.

I hereby certify that at the date of the attestation hereunto annexed, Arthur E. Linnell was the First Deputy Commissioner of Insurance for and within this Commonwealth; duly appointed and qualified and that to his acts and attestations, as such, full faith and credit are and ought to be given, in and out of Court; and further, that his signature to the annexed instrument is genuine.

In Testimony of which, I have hereunto affixed the Great Seal of the Commonwealth the date first above written.

F. W. Cook, Secretary of the Commonwealth. (Seal.)

The Commonwealth of Massachusetts, Department of Banking and Insurance, Division of Insurance, State House, Boston

F 203

To whom it may concern:

I, Arthur E. Linnell, First Deputy Commissioner of Insurance for the Commonwealth of Massachusetts, hereby certify that according to the records of this Department, Thomas J. Gargan of Roxbury, Massachusetts, and William I. Whitley, Somerville, Massachusetts, were on April 18, 1927, authorized to act as agents of the American Surety Company of New York, New York City, New York and said authority is now and has been continuously in full force and effect since said date.

I Further Certify that the American Surety Company of New York, New York City, New York, a corporation organized under the laws of the state of New York, was on April 18, 1927, authorized to transact business in this Com- [fol. 158] monwealth and said authority is now and has been continuously in full force and effect since said date.

In Witness Whereof, I have hereunto set my hand and affixed the official seal of this Division at the City of Boston, this fourth day of November, A. D. 1930.

Arthur E. Linnell, First Deputy Commissioner.
(Seal.)

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EXHIBIT 21

I, Teresa Marotta, of Boston, Suffolk County, Massachusetts for consideration paid, grant to Arcangelo Marotta, my husband, of said Boston, with quitclaim covenants the land with the buildings thereon situate and now numbered 268-272 on North Street in said Boston and bounded and described as follows:

Southeasterly on said North Street about thirty-eight 27/100 feet;
Southwesterly on Lewis Street forty-seven 69/100 feet;
Northwesterly on land now or formerly of Brophy about twenty-two 59/100 feet, and
Northeasterly on land formerly of Currants about forty-five 25/100 feet.

Or however otherwise said premises may be bounded or described and be all or any of said measurements more or less.

Being the same premises conveyed to me by Chester Parker et ux. by deed dated July 10, 1906, recorded with Suffolk Deeds, in Book 3141, Page 318.

The premises are conveyed subject to a mortgage held by the Boston Five Cents Savings Bank, upon which the sum of $5,000 remains unpaid.

Witness my hand and seal this twenty-third day of February, 1928.

Teresa (her X mark) Marotta. (Seal.)

Frank P. Fralli, witness to mark of T. M.

[fol. 159] COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

February 23, 1928.

Then personally appeared the above named Teresa Marotta, and acknowledged the foregoing instrument to be her free act and deed, before me

Frank P. Fralli, Notary Public. My Commission expires April 1, 1932.

(The following is not a part of the deed and is not to be recorded.)

Extract from Chapter 502, Section 3, Acts of 1912

Every deed in substance in the above form when duly executed shall have the force and effect of a deed in fee simple to the grantee, his heirs and assigns to his and their own use, with covenants on the part of the grantor for himself, his heirs, executors, administrators, and successors, with the grantee, his heirs, successors and assigns, that at the time of the delivery of such deed the premises were free from all encumbrances made by him and that he will, and his heirs, executors and administrators shall warrant and defend the same to the grantee and his heirs and assigns forever against the lawful claims and demands of all persons claiming by, through or under the grantor, but against none other.

[fol. 160] [On back:] 233, 10659. Compared. Statute Form of Quitclaim Deed. Teresa Marotta to Arcangelo Marotta. Boston, February 24, 1928, at 9 o'clock and 55 minutes a. m. Received and entered with Suffolk Deeds, Book 4980, Page 233. Wm. T. A. Fitzgerald, Register. Mail to Frank P. Fralli, 256 Hanover Street, Boston, Mass.

[Stamped:] Suffolk Registry of Deeds. Feb. 24, 1928, 9 H. 55 M. a. m. Received for Record Fee 1.

(Here follow Exhibits 22 and 23, side folios 161-164.)

EXHIBIT NO. 22 161-162

105-344

# Commonwealth of Massachusetts.

[Seal.]

SUFFOLK, ss.

To Teresa Marotta of Boston, in our said County of Suffolk, Mario Mogliani of North Providence in the State of Rhode Island doing business as Centredale Fireworks Company, Arcangelo Marotta of said Boston, Pellegrino Muollo of said Boston, Nicola Dello Russo of Medford in the County of Middlesex, and Marciano Grella of said Boston,

GREETING.

WE COMMAND you that you appear before our Superior Court, at the Rules to be holden at Boston within and for our said County of Suffolk, on the first Monday of May next, then and there to answer to a Bill of Complaint exhibited against you in our said Court, by American Surety Company of New York, a corporation duly organized under and according to the laws of the State of New York, and having a usual place of business in said Boston,

And you are hereby required to appear before some one of the justices of this Court, at the Equity Session to be held in the court house in said Boston on the day of next at o'clock in the forenoon, to show cause why a perpetual injunction should not issue as prayed for in said Bill of Complaint

we what our said Court shall then and there consider, in that behalf. under the pains and penalties, in the law, in that behalf provided.

Walter Perley Hall, ESQUIRE, at Boston, the day of April in the year of our Lord hundred and thirty.

Francis A. Campbell, CLERK.

Copy.

Attest. Henry L. Walker Deputy Sheriff.

EXHIBIT NO. 23 163-164

# Commonwealth of Massachusetts.

SUFFOLK, ss. To TERESA MAROTTA and ARCANGELO MAROTTA both of Boston, in our said County of Suffolk, MARIO MOGLIANI of Dedham, in the county of Norfolk, PELLEGRINO MUOLLO of said Boston, NICOLA DELLO RUSSO of Medford, in the County of Middlesex, and MARCIANO URSILLA of said Boston,

[SEAL]

GREETING.

We Command you that you appear before our Superior Court, ~~next~~ to be holden at Boston within our said County of Suffolk, on the first Monday of June next, then and there to answer to a Bill of Complaint exhibited against you in our said Court, by

AMERICAN SURETY COMPANY OF NEW YORK a corporation duly organized under and according to the laws of the State of New York and having a usual place of business in said Boston,

And you are hereby notified to appear before some one of the justices of this Court, at the First Session without Jury in the court house in said Boston, on Thursday the twenty-second day of May, A.D. 1930, at 10 o'clock A.M. to show cause why an injunction should not issue as prayed for in said Bill of Complaint:

and to do and receive what our said Court shall then and there consider, in that behalf.

HEREOF FAIL NOT, under the pains and penalties, in the law, in that behalf provided. Witness, WALTER PERLEY HALL, ESQUIRE, at Boston, the fifteenth day of May in the year of our Lord one thousand nine hundred and thirty.

FRANCIS A. CAMPBELL, CLERK.

A true copy.

Attest. Edward F. Wan

*Deputy Sheriff.*

[fol. 165] Citation, in usual form, showing service on Hutchins & Wheeler, omitted in printing.

[fol. 166] Clerk's certificate to foregoing transcript omitted in printing.

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[Memorandum.—Orders of enlargement of time for docketing case to, and including, December 22, 1931, are here omitted. A. I. Charron, Clerk.]

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[fol. 167] In United States Circuit Court of Appeals for the First Circuit, October Term, 1931

No. 2647

Teresa Marotta, Bankrupt, Appellant,

v.

American Surety Company of New York, Appellee

Appeal from the District Court of the United States for the District of Massachusetts

Before Bingham, Wilson, and Morton, JJ.

Opinion of the Court—April 4, 1932

Wilson, J.:

This in an appeal from a decree of the District Court of Massachusetts adjudicating the appellant a bankrupt on June 24, 1931. The petition in bankrupty was filed by the appellee as a single creditor, and sets forth that there were less than twelve creditors.

The petition alleges that the petitioner was a creditor to the amount of $7,023.78, and that within four months of the filing of the petition the alleged bankrupt conveyed to one Muollo two parcels of real estate; that each conveyance was without consideration and was made by the alleged bankrupt with the fraudulent intent and purpose of putting said real estate beyond the reach of her creditors, including the petitioner.

The petitioner in the petition offered to surrender upon adjudication, for the benefit of the estate in bankruptcy, [fol. 168] any liens it had acquired by an equitable attachment of the above described real estate alleged to be so fraudulently conveyed.

The alleged bankrupt filed an answer denying that she is insolvent, or that she committed the act of bankruptcy alleged in the petition, or that the petitioner is a creditor or has a provable claim against her. The matter was then referred to a master.

Some time prior to 1927, the husband of the alleged bankrupt purchased two parcels of land in Boston and the house where he now lives in Winthrop. While the deeds of the several parcels were paid for by the husband, the deeds were all taken in the name of the wife, but the husband always had attended to the management of the several parcels and collected the rents.

In April, 1927, one Natale, an employee of Mario Mogliani, whose place of business was in Providence, Rhode Island, went to Arcangelo Marotta, husband of the appellant, to seek assistance in obtaining a surety bond. A part of the business of Mogliani was conducting public exhibitions of fireworks. Before giving any such exhibitions in Massachusetts, an exhibitor is required by statute (Chap. 148, Secs. 57C and 57D, G. L. Mass.) to file a bond with sufficient sureties with the State Treasurer to answer for any damage to person or property resulting therefrom. While there was some dispute as to what was said by Natale to the Marottas as to the nature of the instrument to be signed, the husband told Natale that he could not sign a bond as the property was in his wife's name. As a result of the conference, Natale and Mr. and Mrs. Marotta went to the office of a lawyer, where Mrs. Marotta, the alleged bankrupt, signed an application for a surety bond, commonly referred to as a "Fireworks Bond," to be executed by Mogliani as principal and the appellee as surety, and running to the Treasurer of the Commonwealth of Massachusetts, and conditioned to protect persons and property from any loss or damage resulting from a public exhibition of fireworks.

In the application for the bond, which was at some time also signed by Mogliani, the applicants were described as

indemnitors, and each agreed to hold the appellee harmless in case it was called on as surety to make good any loss or [fol. 169] damage to person or property resulting from any exhibition of fireworks given by Mogliani in Massachusetts.

This instrument of indemnity was under seal and was executed at the office of the lawyer without the knowledge of the appellee, as neither Natale nor the lawyer in any way represented the appellee. In consideration of Mrs. Marotta assuming the obligation of an indemnitor under this instrument, Mogliani paid to her or her husband the sum of $800.

At the time of signing this application, Mrs. Marotta, in the presence of her husband, also signed a statement as to her property, and set forth therein that she had an equity in three parcels of real estate of the value of approximately $60,000 and cash to the amount of $8,000. The appellee relied on this statement as true in signing as surety on the bond for Mogliani.

Afterward Mario Mogliani, as principal, signed an instrument purporting to be a bond, but to which he failed to affix his seal, in the penal sum of $15,000, which the appellee signed as surety under its seal. This instrument was delivered to the State Treasurer of Massachusetts, and a certificate that a bond was filed as required by law was issued to the State Fire Marshal and to Mogliani prior to September 26, 1927. While giving a public exhibition of fireworks in the city of Everett on September 26, 1927, one Beatrice Ricci was seriously injured, and claim was made against Mogliani, and the appellee was notified as surety on the bond.

The alleged bankrupt was also notified of the claim and that she was liable on the contract of indemnity contained in the application which she signed. On April 12, 1928, an action was brought against Mogliani by Beatrice Ricci, and Arcangelo Marotta and his wife were also notified of this action. The husband, who, in all matters connected with this case, acted for his wife, consulted counsel, and was notified by counsel for Mogliani that it was a serious matter, and that the appellant might be called on to pay heavy damages under her agreement of indemnity, and suggested it might be better to settle, but Marotta refused, and suggested that the counsel for Mogliani go ahead and try the case.

In February, 1930, the case went to trial, and on March [fol. 170] 4, 1930, a verdict against Mogliani was returned for $10,000. Marotta again consulted his counsel, who went to Providence, Rhode Island, where Mogliani's place of business was, and after investigation advised Marotta and the counsel acting for Mogliani that a motion for a reduction of the verdict should be made in the case. On March 5, 1930, a motion for a new trial was filed on the ground that the damages awarded were excessive. On March 30, 1930, the motion was granted, unless a remititur was filed, which was done, and the damages were reduced to $6,540.68, with costs taxed at $110.40. On April 10, 1930, judgment was entered for this amount and an execution issued on which demand was made upon Mogliani, who was unable to pay.

Following the verdict against Mogliani on March 4, 1930, Arcangelo Marotta went to another lawyer, who knew nothing of the signing of the instrument by which his wife had become an indemnitor of the appellee, or of the verdict against Mogliani; and after some talk about protecting him or his children, Marotta said he wanted a deed made out from his wife to him of certain property which he had bought some time before and had taken the deeds in her name. On March 18, 1930, a quitclaim deed was executed by the alleged bankrupt and her husband of the two parcels of land referred to and delivered to one Pellegrino Muollo, who afterwards executed two mortgages, one on the Winthrop property and one on the property located on Lewis Street in the city of Boston. The equity in these parcels was then transferred by Muollo to Arcangelo Marotta in trust for his children. It is not claimed that any consideration passed between Muollo and the Marottas in these transactions.

On April 18, 1930, an action in the name of the State Treasurer was brought on the judgment against the appellee for the benefit of the injured woman. The appellee then paid the amount of the judgment against Mogliani, and judgment against the appellee was entered on April 30, 1930.

The appellee in April, 1930, instituted two suits in equity against the appellant, seeking to set aside the conveyances made by the appellant on March 18, 1930, as being fraudu- [fol. 171] lent as to the appellee. On the second suit in

equity the property so conveyed on March 18, 1930, was attached and an injunction issued enjoining any further conveyances or encumbering it. On July 18, 1930, the petition in bankruptcy was filed. At the time of filing the petition, and on March 18, 1930, when the alleged fraudulent conveyances were made, the appellee, if a creditor, was the only creditor of the alleged bankrupt.

The above facts were either found by the master and District Court, or are undisputed.

The appellant's assignments of error, twenty-eight in number, raise in brief the following issues: (1) whether the appellant was induced to sign the contract of indemnity by fraud; (2) whether she was bound by the contract of indemnity because the bond, when given, did not have attached the seal of the principal; (3) whether the bond was ever delivered to the State Treasurer at the State House in Boston prior to the exhibition on September 26, 1927, at which the Ricci girl was injured; (4) whether the appellee was a creditor of the appellant on March 18, 1930, and, if so, whether the conveyances made by the appellant on that date were made to hinder, delay or defraud the appellee; (5) and if the appellee was not a creditor of the alleged bankrupt on March 18, 1930, whether the appellee could alone file an involuntary petition in bankruptcy against the appellant, even if, at the time of filing the petition, it had a provable claim; (6) and whether having begun an action in the state courts seeking to set aside the conveyances alleged to be fraudulent, the appellee should in equity be left to its remedy in the state court.

Of these issues we need consider only the fourth and fifth, which in effect are: that the conveyances on March 18, 1930, did not constitute an act of bankruptcy as defined in Sec. 3 of the Bankruptcy Act, since the appellee was not a creditor as defined in Sec. 1 (9) of the Act at the time of these transfers; and if the petitioner at the time of the alleged act of bankruptcy was not a creditor as defined in the Act, it alone could not file an involuntary petition in bankruptcy, even though it had a provable claim at the time of filing the petition.

[fol. 172] Sec. 3 of the Bankruptcy Act, in defining acts of bankruptcy, provides that it shall consist of a person "having (1) conveyed, transferred, concealed or removed * * * any part of his property with intent to hinder, de-

lay or defraud his creditors, or any one of them"; and Sec. 1 (9) of the Act provides that, as used in the Act, the word "'Creditor' shall include anyone who own a demand or claim provable in bankruptcy."

The petition in bankruptcy in this case alleges, as the only act of bankruptcy, that the conveyances by Marotta and his wife on March 18, 1930, were made with the intent to hinder, delay and defraud the petitioner; but the alleged bankrupt in her answer and her counsel in argument deny that the petitioner was a creditor having a claim provable in bankruptcy at that time; and contend that in order for a fraudulent transfer to constitute an act of bankruptcy, the creditor hindered, delayed or defrauded must be a creditor with a provable claim at the time.

Counsel for petitioner, however, contends that this is not necessary; that it is sufficient if the petitioner has a provable claim at the time of filing the petition, and cites In re Van Horn, 246 Fed. 822. The case cited is not in point, since it appears in that case that there were creditors with provable claims at the time the alleged act of bankruptcy was committed; and an act of bankruptcy having been committed, any creditor having a provable claim at the time of filing of the petition in bankruptcy is entitled to share in the distribution of the assets and may join in the petition, though he had no provable claim at the time the act of bankruptcy was committed, which is all that the Van Horn case holds.

We think the contention of the appellant, that a fraudulent transfer to constitute an act of bankruptcy must hinder, delay or defraud a creditor or creditors holding a claim or claims provable in bankruptcy at the time the act is committed, must be sustained. Without an act of bankruptcy an involuntary petition cannot be maintained under Sec. 3 (b) of the Act.

Was the claim of the petitioner against the appellant a provable claim on March 18, 1930?

A transfer made with an intent to defraud a contingent creditor, or even subsequent creditors, may be set aside in [fol. 173] the state courts, or by a trustee in bankruptcy under Sec. 70 (e); Collier on Bankruptcy, 13th Ed. p. 1770; Thomson v. Crane, 73 Fed. 327; Kautz v. Sheridan, 118 Me. 28; Holbrook v. International Trust Co., 220 Mass. 150; Mowry v. Reed, 187 Mass. 174; but under the Bankruptcy

Act of 1898 contingent claims are not provable in bankruptcy, though unliquidated claims may be, if the liability is fixed by contract. Sec. 63 b of the Bankruptcy Act; Collier on Bankruptcy, 13th Ed. p. 1419; In re American Vacuum Cleaner Co., 192 Fed. 939; In re Inman & Co., 171 Fed. 185; In re Brinckman, 103 Fed. 65.

A claim arising out of a tort—the action against Mogliani was based on negligence—is contingent and is not provable in bankruptcy until reduced to a judgment. In re Brinckmann, supra; Beers v. Hanlin, 99 Fed. 695. A verdict alone does not result in that "fixed liability," defined in Sec. 63, as necessary to constitute a provable claim; Collier on Bankruptcy, 13th Ed. p. 1387; Black v. McClelland, Fed. Cases, 1462; In re Ostrom, 185 Fed. 988; since a verdict is not conclusive. A motion to set aside a verdict, though based on excessive damages alone, may be granted unless a remittitur is filed, and this cannot be determined until action is had thereon by the court and plaintiff.

While the relations between the petitioner and the alleged bankrupt in this case were contractual, the petitioner's rights and the apellant's obligations under the contract of indemnity were both contingent, until the judgment was entered against Mogliani on April 10, 1930. The alleged fraudulent transfers having been made on March 18, 1930, at which time the petitioner did not have a provable claim against the alleged bankrupt, no act of bankruptcy was committed thereby within the definition of Sec. 3 (1) of the Act, since no creditor, as defined in Sec. 1 (9), was thereby hindered, delayed or defrauded.

No act of bankruptcy having been committed, the petition must be dismissed and the petitioner left to its remedy under the state laws.

The decree of the District Court is reversed with costs and the case is remanded to that court with instructions to dismiss the petition.

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[fol. 174] DISSENTING OPINION

MORTON, J. (dissenting):

The majority opinion dismisses the petition on the ground that the fraudulent conveyance relied on as the act

of bankruptcy did not have that effect, because at the date of it the petitioning creditor's claim had not yet become provable in bankruptcy. The conveyance in question was a voluntary one, and was made with the express purpose of defeating this claim—an intentional, carefully prepared fraud. It is not disputed that the claim became provable before the petition was filed.

Conveyances in fraud of creditors have been recognized and invalidated by our law for some hundreds of years. They always involve two essential elements, (1) the transfer with the fraudulent intent; (2) a creditor who was thereby defrauded. What constitutes a person a "creditor" with the right to attack such a conveyance has been settled by many decisions. There is no doubt that this petitioner was such a creditor. Smith v. Vodges, 92 U. S. 183; McLaughlin v. Bank, 7 Howard 220; Yardley v. Torr, 67 Fed. 857; Thomson v. Cram, 73 Fed. 327.

My brethren hold that the fraudulent conveyance which is made an act of bankruptcy by Section 3 is not the classic fraudulent conveyance of the Statute of Elizabeth and our common law, but something different and narrower, viz., a conveyance by which creditors having claims provable under the bankruptcy act were hindered, delayed or defrauded. I am unable to accept this view. I think that the bankruptcy act adopted the fraudulent conveyance as known in our law and made it an act of bankruptcy, and that the word "creditor" in that connection takes its meaning from the old law and not from the defining section of the new statute in which it was used.

This conclusion is I think author-atively approved in Coder v. Art (213 U. S. at 242), where the court said:

"We are of opinion that Congress, in enacting Section 67e, and using the terms 'to hinder, delay or defraud creditors,' intended to adopt them in their well-known meaning as being aimed at conveyances intended to defraud. In Section 60 merely preferential transfers are de- [fol. 175] fined, and the terms on which they may be set aside are provided; in Section 67e, transfers fraudulent by the well-recognized principles of the common law and the Statute of Elizabeth are invalidated. The same terms are used in Section 3, subdivision 1, in which it is made an act of bankruptcy to transfer property with intent to hinder, delay or defraud creditors." Day, J.

The opinion then quotes with approval, "The language of subsection 1, of Section 2, is the familiar language of the statutes against conveyances fraudulent as against creditors, and we think there can be no doubt that Congress intended the words employed should have the same construction and effect as have for a long period of time been attributed to those words." Severens, J., Lansing Boiler Wks. v. Ryerson, 128 Fed. 701, C. C. A. 6.)

Preferential transfers stand of course on an entirely different footing. The invalidity of them is created only by the bankruptcy act; and the term "creditor" in that connection has the meaning defined in the act. Richardson v. Shaw, 209 U. S. 365, 381. See too Scales v. Holje, 183 Pac. 308 (Cal.).

In view of Williams v. U. S. F. & G. Co., 236 U. S. 549 (which, like the present case, involved an agreement by the bankrupt to indemnify a surety), I incline to think that the petitioner's claim was provable in bankruptcy at the date of the fraudulent conveyance; but it is unnecessary to express a definite opinion on this difficult question. See too Thomson v. Cram, supra.

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[fol. 176] On January 20, 1932, this cause came on to be heard, and was fully heard by the court, Honorable George H. Bingham, Honorable Scott Wilson, and Honorable James M. Morton, Jr., Circuit Judges, sitting.

Thereafter, to wit, on the fourth day of April, A. D. 1932, the opinion of the court (page 167) was filed, and the following Final Decree was entered:

IN UNITED STATES CIRCUIT COURT OF APPEALS

FINAL DECREE—April 4, 1932

This cause came on to be heard January 20, 1932, upon the transcript of record of the District Court of the United States for the District of Massachusetts, and was argued by counsel:

Upon consideration whereof, It is now, to wit, April 4, 1932, here ordered, adjudged and decreed as follows: The decree of the District Court is reversed with costs and

the case remanded to that court with instructions to dismiss the petition.

By the Court.

Arthur I. Charron, Clerk.

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Clerk's certificate to foregoing transcript omitted in printing.

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[fol. 177] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 10, 1932

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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Endorsed on cover: File No. 36,828. U. S. Circuit Court of Appeals, First Circuit. Term No. 131. American Surety Company of New York, petitioner, vs. Teresa Marotta. Petitioner for a writ of certiorari and exhibit thereto. Filed June 3, 1932. File No. 36,828.

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CHARLES ELMORE

# Supreme Court of the United States.

OCTOBER TERM, 1932.

No. 131

## AMERICAN SURETY COMPANY OF NEW YORK Petitioner,

*v.*

## TERESA MAROTTA.

## PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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# Supreme Court of the United States.

OCTOBER TERM, 1932.

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AMERICAN SURETY COMPANY OF NEW YORK,
PETITIONER.

*v.*

TERESA MAROTTA.

No.

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## PETITION FOR WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

The American Surety Company of New York, a corporation organized under the laws of the State of New York, prays that a writ of certiorari be issued to review the judgment of the Circuit Court of Appeals for the First Circuit entered on the fourth day of April, 1932, in the cause in said Court between the above named parties.

### Summary Statement of Matters Involved.

The cause in which this writ of certiorari is sought is a petition in bankruptcy originally brought by the petitioner, the American Surety Company of New York, in the District Court for the District of Massachusetts against Teresa Marotta, a resident of Winthrop, Massachusetts. The petition in bankruptcy was filed on July 16, 1930. The act of bankruptcy claimed is that the alleged bankrupt on March 18, 1930, and within four months next preceding the date of the petition,

transferred and conveyed certain real estate owned by her with intent to hinder, delay or defraud her creditors, including the petitioner (R. 1–5). The alleged bankrupt filed an answer denying that she had committed the act of bankruptcy alleged or that she was insolvent and denying that the petitioner was a creditor or had a provable claim against her (R. 5–6). The case was tried before a Special Master whose report is found in the record at pages 6–27. The District Court heard the case on the report of the Special Master and on the evidence taken before him, and on June 24, 1931, ordered that Teresa Marotta be adjudicated bankrupt (R. 36). The District Court made special findings of fact printed in the record at pages 37–45, but rendered no opinion. On appeal the Circuit Court of Appeals, by a final decree entered on April 4, 1932, reversed the decree of the District Court and instructed that court to dismiss the petition (R. 176). The material facts are stated in the report of the Special Master and the findings of the District Court (R. 6–27, 37–45). A summary statement of facts bearing on the issues raised by this petition follows.

On April 15, 1927, the alleged bankrupt, Teresa Marotta, executed an indemnity agreement introduced in evidence as exhibit 6 (R. 101), running to the petitioner, in which she agreed to indemnify the petitioner against any liability arising from the execution of a fireworks bond to the Commonwealth of Massachusetts on which Mario Mogliani was to be the principal and the petitioner the surety (R. 38). At the same time she signed a statement of her financial condition which showed as a part of her assets certain real estate in Boston and Winthrop, Massachusetts (R. 38–39, exh. 7, R. 107).

In reliance on this indemnity agreement and financial statement the petitioner became surety on the fireworks bond referred to in the indemnity agreement. The principal on the bond was Mario Mogliani. A copy of this bond, except for the fact that the copy does not show the seal of the petitioner which was on the original, was introduced in evidence as exhibit

1 and is found at page 93 of the record. This was a statutory bond required by Massachusetts statutes as a condition precedent to giving a permit for a public display of fireworks in Massachusetts (R. 39–40). This bond was filed in the office of the Treasurer and Receiver General of Massachusetts at some time before September 26, 1927 (R. 39–40). The condition of the bond was as follows:

> "The Condition of this Obligation is such that if the said Mario Mogliani d/b as Centredale Fireworks Company, his heirs, executors and administrators, successors and assigns, shall pay any judgment obtained in an action brought against the said Principal for discharging, firing-off, exploding or displaying fireworks at any public exhibition or exhibitions thereof, for or on account of any loss, damage, or injury resulting to persons or property by reason of the said discharging, firing-off, exploding or displaying of said fireworks, at said public exhibition or exhibitions; provided that said judgment is obtained in an action brought within a period of twelve months following the date of the public exhibition or exhibitions, at which the cause of said action is alleged to have occurred, then this obligation shall be void, otherwise it shall remain in full force and effect."

The bond was signed and sealed by the petitioner and was signed by the principal, Mario Mogliani, opposite the printed word "Seal" which appears on the bond, but bore no other seal of Mogliani. The petitioner intended to be bound by the bond in the condition in which it was filed (R. 40).

On September 26, 1927, one Beatrice Ricci was injured by the discharge of fireworks under the direction of Mogliani at a public exhibition of fireworks in Everett, Massachusetts. On April 12, 1928, Beatrice Ricci brought an action in the Superior Court for Middlesex County, Massachusetts, against the principal on the bond to recover for such injuries. On

March 4, 1930, the jury brought in a verdict in her favor in this action for $10,000 (R. 40–41). The alleged bankrupt, who had knowledge of this verdict through her husband, who was acting as her agent, on March 18, 1930, conveyed all her real estate, including that described in the petition in bankruptcy, to one Muollo. Muollo in turn executed two mortgages on parcels included in this conveyance for $8,000 and $20,000 respectively, and then conveyed all the property, subject to these mortgages, to Arcangelo Marotta, the husband of the alleged bankrupt, as trustee for the children of Arcangelo Marotta and the alleged bankrupt. The real estate conveyed belonged at the time to Teresa Marotta and was all the property which she had (R. 41–43).

All of these conveyances, including the mortgages, were made without any consideration. The District Court found expressly that the conveyances were made by the alleged bankrupt with specific intent by the alleged bankrupt to place the property conveyed beyond the reach of the petitioner and to hinder, delay and defraud the petitioner (R. 43).

At the time of these conveyances Teresa Marotta had no creditors other than the petitioner. At that time no judgment had been entered in the action brought by Beatrice Ricci against Mario Mogliani. The verdict of the jury in that action for $10,000 was reduced to $6,500 by order of the Court made on March 29, 1930, and judgment for the plaintiff was entered in this action on April 10, 1930, for $6,540.08 and costs (R. 11, 43–44). Counsel for Beatrice Ricci made an unsuccessful demand against Mogliani on an execution issued on this judgment and then made demand on the petitioner to pay it. On April 18, 1930, an action was brought against the petitioner in the Municipal Court of the City of Boston in accordance with statutory requirements on the bond filed with the Treasurer and Receiver General for the benefit of Beatrice Ricci. On the same day, after the suit was brought, the petitioner paid the amount then due on the Ricci execution, which was $6,653.78 (R. 43–44).

Before bringing the petition in bankruptcy, the petitioner had brought bills in equity in the Superior Court for Suffolk County, Massachusetts to set aside the conveyance made by Teresa Marotta. These bills are still pending (R. 44–45).

The District Court adjudicated Teresa Marotta to be a bankrupt. The Circuit Court of Appeals reversed this decision and ordered that the petition be dismissed. The decision of the Circuit Court of Appeals is based solely on the ground that a fraudulent transfer, to constitute an act of bankruptcy, must hinder, delay or defraud a creditor *holding a claim provable in bankruptcy at the time the transfer is made.* The Court held that in this case the petitioner had no provable claim on March 18, 1930, the date of the alleged transfer, and that, as there were no other creditors of Teresa Marotta on that date, the transfer was not an act of bankruptcy. The majority of the Court while conceding that a transfer made with a specific intent to defraud a contingent creditor or a subsequent creditor may be set aside at common law and under the statute of Elizabeth, held that such a transfer is not an act of bankruptcy under section 3a(1) of the Bankruptcy Act. Morton, J. dissented, contending that the first act of bankruptcy is identical with the classic fraudulent conveyance of the statute of Elizabeth and the common law.

**Reasons Relied on for the Allowance of the Writ.**

1. The decision of the Circuit Court of Appeals in this case is based on a construction of the bankruptcy act which is erroneous and is in conflict with the decision of this Court in the case of *Coder* v. *Arts*, 213 U. S. 223.

2. The decision of the Circuit Court of Appeals that the expression "conveyed, transferred, concealed or removed . . . any part of his property with intent to hinder, delay or defraud his creditors or any of them" as used in section 3a(1) of the Bankruptcy Act does not refer to the well known transfer in

fraud of creditors as defined at common law and the statute of Elizabeth, is in conflict with the decision of the Circuit Court of Appeals for the Sixth Circuit in the case of *Lansing Boiler & Engine Works* v. *Ryerson*, 128 Fed. Rep. 701.

3. The question involved in the decision of the Circuit Court of Appeals as to whether a transfer by a debtor of all his property with a specific intent to defraud a creditor having at the time a contingent claim is an act of bankruptcy under section 3a(1) of the Bankruptcy Act, is of great importance in the general administration of bankruptcy and should be settled by a decision of this Court in order that there may be uniformity of decision throughout the United States on this question.

4. The decision of the Circuit Court of Appeals that the petitioner had no provable claim against Teresa Marotta on March 18, 1930, raises an important question as to the construction of the Bankruptcy Act which should be settled by the decision of this Court.

5. On the facts contained in the record and the provisions of the Bankruptcy Act which apply, the petitioner was entitled to have Teresa Marotta adjudicated a bankrupt and certiorari should be granted in order that the decision of the Circuit Court of Appeals to the contrary may be reversed and the decree of the District Court affirmed.

For a statement of the errors assigned by the petitioner reference is made to the assignment of errors contained in the annexed brief, which is made a part hereof.

Wherefore your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the Circuit Court of Appeals for the First Circuit commanding that court to certify and to send to this Court for its review and determination on a day certain to be therein named a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket No. 2647, *Teresa Marotta, Appellant*, v. *American Surety Company of New York, Appellee*, and that the said decree of

the Circuit Court of Appeals for the First Circuit may be reversed by this Honorable Court and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

AMERICAN SURETY COMPANY OF NEW YORK,

By HARRY LEBARON SAMPSON,
*Counsel for Petitioner.*

# Supreme Court of the United States.

OCTOBER TERM, 1932.

AMERICAN SURETY COMPANY OF NEW YORK, PETITIONER.
*v.*
TERESA MAROTTA. } No.

## BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

### I.

### THE OPINIONS OF THE COURT BELOW.

The opinions in the Circuit Court of Appeals are printed at pages 167–175 of the record. The case has not yet been reported.

### II.

### JURISDICTION OF THIS COURT.

The jurisdiction of this Court is based on the Judicial Code, section 240, as amended by the Act of February 13, 1925 (43 Stat. 936). The material portion of this section is as follows:

> "(a) In any case, civil or criminal, in a circuit court of appeals, or in the Court of Appeals of the District of Columbia, it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, whether Government or other litigant, to require by certiorari, either before or after a judgment or decree by such lower court, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal."

The date of the judgment of the Circuit Court of Appeals which the petitioner seeks to review is April 4, 1932 (R. 176).

## III.

## STATEMENT OF THE CASE.

A concise statement of the case has been made at the beginning of the petition for certiorari. In the interest of brevity the facts there stated are not repeated in this brief.

## IV.

## SPECIFICATION OF ERRORS.

The petitioner contends that the Court below erred in the following respects:

1. The Court below erred in ruling that the transfer by the alleged bankrupt, Teresa Marotta, of all her property made with the specific intent to hinder, delay and defraud the petitioner, within four months of the filing of the petition, would not constitute an act of bankruptcy under section 3a(1) of the Bankruptcy Act unless the petitioner had at the time of the transfer a claim which would be provable in bankruptcy.

2. The Court below erred in ruling that the term "creditors" as used in section 3a(1) of the Bankruptcy Act was confined to creditors having claims which would be provable in bankruptcy at the date of the transfer referred to in said section.

3. The Court below erred in ruling that the claim of the petitioner under the indemnity agreement signed by Teresa Marotta was not a claim which was provable in bankruptcy at the date on which she transferred her property.

4. The Court below erred in failing to find and rule that the petitioner was a creditor of Teresa Marotta on March 18, 1930, the date of the transfer which she made.

5. The Court below erred in failing to find and rule that the conveyance made by Teresa Marotta on March 18, 1930, was

made with intent to hinder, delay and defraud a creditor and was an act of bankruptcy.

6. The Court below erred in failing to find and rule that the petitioner was entitled to maintain the petition and that Teresa Marotta was properly adjudicated bankrupt by the District Court for the District of Massachusetts.

## V.

## ARGUMENT.

This brief is directed to the question whether the writ of certiorari should be granted. Accordingly it will deal principally with the main points relating to the construction of the Bankruptcy Act on which the case turned in the Circuit Court of Appeals. Other issues raised in the case are discussed in this brief only to such an extent as may be necessary in order to preserve the rights of the petitioner to argue them more fully in case the petition is granted and the case is heard on the merits.

The material provisions of the Bankruptcy Act are:

> "Section 3. Acts of Bankruptcy.—a. Acts of bankruptcy by a person shall consist of his having (1) conveyed, transferred, concealed, or removed, or permitted to be concealed or removed any part of his property with intent to hinder, delay, or defraud his creditors, or any of them;... (U. S. Code, Title 11, c. 3, sec. 21: Act of July 1, 1898, c. 541, sec. 3, 30 Stat. 546).
>
> "Section 1. Meaning of words and phrases. The words and phrases used in this title and in proceedings pursuant hereto shall, unless the same be inconsistent with the context, be construed as follows: (1) "A person against whom a petition has been filed" shall include a person who has filed a voluntary petition; (2) "adjudication" shall mean the date of the entry of a decree that the defendant, in a bankruptcy proceeding, is a bankrupt, or if such decree is

appealed from, then the date when such decree is finally confirmed; (3) "appellate courts" shall include the circuit courts of appeals of the United States, the Court of Appeals of the District of Columbia, the supreme courts of the Territories, and the Supreme Court of the United States; (4) "bankrupt" shall include a person against whom an involuntary petition or an application to set a composition aside or to revoke a discharge has been filed, or who has filed a voluntary petition, or who has been adjudged a bankrupt; (5) "clerk" shall mean the clerk of a court of bankruptcy; (6) "corporations" shall mean all bodies having any of the powers and privileges of private corporations not possessed by individuals or partnerships and shall include limited or other partnership associations organized under laws making the capital subscribed alone responsible for the debts of the association, joint stock companies, unincorporated companies and associations, and any business conducted by a trustee, or trustees, wherein beneficial interest or ownership is evidenced by certificate or other written instrument; (7) "court" shall mean the court of bankruptcy in which the proceedings are pending, and may include the referee; (8) "courts of bankruptcy" shall include the district courts of the United States and of the Territories and possessions to which this title is or may after July 1, 1898, be applicable, the Supreme Court of the District of Columbia, and the United States Court of Alaska; (9) "creditor" shall include any one who owns a demand or claim provable in bankruptcy, and may include his duly authorized agent, attorney, or proxy; (10) "date of bankruptcy," or "time of bankruptcy," or "commencement of proceedings," or "bankruptcy," with reference to time, shall mean the date when the petition was filed; (11) "debt" shall include any debt, demand, or claim provable in bankruptcy; (12) "discharge" shall mean the release of a bankrupt from all of his debts which

are provable in bankruptcy, except such as are excepted by this title; (13) "document" shall include any book, deed, or instrument in writing; (14) "holiday" shall include Christmas, the Fourth of July, the twenty-second of February, and any day appointed by the President of the United States or the Congress of the United States as a holiday or as a day of public fasting or thanksgiving; (15) a person shall be deemed insolvent within the provisions of this title whenever the aggregate of his property, exclusive of any property which he may have conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, with intent to defraud, hinder, or delay his creditors, shall not, at a fair valuation, be sufficient in amount to pay his debts; (16) "judge" shall mean a judge of a court of bankruptcy, not including the referee; (17) "oath" shall include affirmation; (18) "officer" shall include clerk, marshal, receiver, referee, and trustee, and the imposing of a duty upon or the forbidding of an act by any officer shall include his successor and any person authorized by law to perform the duties of such officer; (19) "persons" shall include corporations, except where otherwise specified, and officers, partnerships, and women, and when used with reference to the commission of acts which are herein forbidden shall include persons who are participants in the forbidden acts, and the agents, officers, and members of the board of directors or trustees, or other similar controlling bodies of corporations; (20) "petition" shall mean a paper filed in a court of bankruptcy or with a clerk or deputy clerk by a debtor praying for the benefits of this title, or by creditors, alleging the commission of an act of bankruptcy by a debtor therein named; (21) "referee" shall mean the referee who has jurisdiction of the case or to whom the case has been referred, or any one acting in his stead; (22) "conceal" shall include secrete, falsify, and mutilate; (23) "secured creditor" shall include a creditor



who has security for his debt upon the property of the bankrupt of a nature to be assignable under this title, or who owns such a debt for which some indorser, surety, or other persons secondarily liable for the bankrupt has such security upon the bankrupt's assets; (24) States shall include the Territories and possessions to which this title is, or may after July 1, 1898, be, applicable, Alaska, and the District of Columbia; (25) "transfer" shall include the sale and every other and different mode of disposing of or parting with property, or the possession of property, absolutely or conditionally, as a payment, pledge, mortgage, gift, or security; (26) "trustee" shall include all of the trustees of an estate; (27) "wage earner" shall mean an individual who works for wages, salary, or hire, at a rate of compensation not exceeding $1,500 per year; (28) words importing the masculine gender may be applied to and include corporations, partnerships, and women; (29) words importing the plural number may be applied to and mean only a single person or thing; (30) words importing the singular number may be applied to and mean several persons or things." (United States Code, Title 11, c. 1, sec. 1: July 1, 1898, c. 541, sec. 1, 30 Stat. 544; Apr. 12, 1900, c. 191, sec. 34, 31 Stat. 85; Mar. 3, 1909, c. 269, sec. 1, 35 Stat. 838; May 27, 1926, c. 406, sec. 1, 44 Stat. 662.)

**A. The decision of the Circuit Court of Appeals is based on a construction of the Bankruptcy Act which is in conflict with the decision of this Court in the case of *Coder* v. *Arts*, 213 U. S. 223.**

In *Coder* v. *Arts* the question arose as to whether a mortgage by a bankrupt to one of his creditors was made with the intent to hinder, delay and defraud creditors. It appeared that the bankrupt, when he gave the mortgage, was insolvent and knew it; that the mortgage in fact constituted a preference of the

mortgagee over other creditors; that the mortgagee had no cause to believe that the mortgagor was insolvent at the time; and that the mortgage was not made with any actual intent or purpose on the part of the mortgagor to hinder, delay or defraud his creditors. The claim was made by the trustee in bankruptcy that this mortgage was void under the following provisions of section 67e of the Bankruptcy Act:

> "e. All conveyances, transfers, assignments, or incumbrances of his property, or any part thereof, made or given by a person adjudged a bankrupt under the provisions of this title within four months prior to the filing of the petition, with the intent and purpose on his part to hinder, delay, or defraud his creditors, or any of them, shall be null and void as against the creditors of such debtor, except as to purchasers in good faith and for a present fair consideration;"

In support of this contention it was argued that as the mortgagor knew that he was insolvent when he gave the mortgage, an intent on his part to hinder, delay or defraud creditors must be presumed, because this was the necessary effect of the mortgage. This Court was of the opinion, however, that the expression "with the intent and purpose on his part to hinder, delay or defraud his creditors" used in section 67e referred to those transfers which according to the common law and the Statute of Elizabeth were regarded as fraudulent, and that as a mortgage given to an existing creditor was not a fraudulent conveyance under the common law and the Statute of Elizabeth in the absence of an actual intent to hinder, delay and defraud, the mortgage in question was valid. In discussing this issue the Court said (213 U. S. 223, at p. 242),

> "We are of opinion that Congress, in enacting sec. 67e, and using the terms 'to hinder, delay or defraud creditors,' intended to adopt them in their well-known meaning as

being aimed at conveyances intended to defraud. In sec. 60 merely preferential transfers are defined, and the terms on which they may be set aside are provided; in sec. 67e, transfers fraudulent under the well-recognized principles of the common law and the statute of Elizabeth are invalidated. The same terms are used in sec. 3, subdivision 1, in which it is made an act of bankruptcy to transfer property with intent to hinder, delay or defraud creditors. Such transfers have been held to be only those which are actually fraudulent. It was so held in *Lansing Boiler & Engine Works* v. *Ryerson*, 128 Fed. Rep. 701. Considering the language, which is identical with that in sec. 67e, the Circuit Court of Appeals, speaking through Judge Severens, said:

'The language of subsection 1 of section 2 is the familiar language of statutes against conveyances fraudulent as against creditors, and we think there can be no doubt that Congress intended the words employed should have the same construction and effect as have for a long period of time been attributed to those words. *Githens* v. *Shiffler*, 112 Fed. Rep. 505.'"

It is clear in the case at bar that according to the common law and under the Statute of Elizabeth the transfer made by Teresa Marotta with the actual intent to defraud the petitioner was a transfer with intent to hinder, delay and defraud a creditor. This was recognized in both the majority and the minority opinions of the Circuit Court of Appeals (R. 172–174). A few of the decisions which support this proposition are cited below:

*McLaughlin* v. *The Bank of Potomac*, 7 How. 220.
*Smith* v. *Vodges*, 92 U. S. 183.
*Mowry* v. *Reed*, 187 Mass. 174.
*Thomson* v. *Crane*, 73 Fed. 327.

It is therefore clear that the majority of the judges in the Circuit Court of Appeals have departed from the definition of

what constitutes a transfer with intent to hinder, delay or defraud creditors which was adopted in *Coder* v. *Arts*, and have set up a new and narrower definition. It is submitted that certiorari should be granted in order to remove the confusion which will otherwise be created as to the construction of the portion of the Bankruptcy Act relating to fraudulent transfers.

**B. The decision of the Circuit Court of Appeals for the First Circuit in the case at bar is in conflict with the opinion of the Circuit Court of Appeals for the Sixth Circuit in *Lansing Boiler & Engine Works* v. *Ryerson*, 128 Fed. 701.**

In that case the issue was whether a mortgage given by a corporation was an act of bankruptcy under section 3a(1) of the Bankruptcy Act. It appeared that the corporation had given a mortgage of all its property to certain of its creditors to the exclusion of its other creditors, when it was known by its officers to be insolvent. The trial court held that under those circumstances the mortgagor must have intended to hinder and delay the other creditors, and refused to admit evidence as to the actual intent of the mortgagor. The Circuit Court of Appeals for the Sixth Circuit held that the conveyances which were made acts of bankruptcy by section 3a(1) of the Bankruptcy Act were those which were fraudulent by the common law and the Statute of Elizabeth and that as the mortgage in question would not have been fraudulent under them without proof of an actual intent to defraud, the ruling of the lower court was erroneous. This case, which rests squarely on the ground that the transfer with intent to hinder, delay and defraud which is referred to in section 3a(1) is identical with those transfers which were void under the common law and the Statute of Elizabeth, is inconsistent with the decision of the Circuit Court of Appeals in the case at bar.

It is submitted that it is essential to the proper administration of the Bankruptcy Act that there should not be two incon-

sistent interpretations of this section in effect in different circuits, and that the writ of certiorari should be granted in order that the proper interpretation may be settled by a decision of this Court.

**C. The Court below erred in ruling that the term "creditors" as used in section 3a(1) of the Bankruptcy Act was confined to persons having a claim which would be provable in bankruptcy at the date of the transfer referred to in this section.**

This point has been covered in part by the preceding portion of the argument. The following additional considerations are also submitted. Apparently the opinion of the majority of the Court below was based on the proposition that the word "creditor" is defined in section 1 of the Act as anyone who owns a demand or claim provable in bankruptcy, and therefore that the word must be so interpreted in the expression "hinder, delay or defraud his creditors or any of them" used in section 3a(1).

It is respectfully submitted that this conclusion is not supported by the provisions of the Bankruptcy Act or by the general rules of statutory interpretation which are applicable.

In the first place, it is to be observed that there is a careful distinction in section 1 of the Bankruptcy Act, in the use of the verbs "shall include" and "shall mean." Where Congress intended that a word should describe a definite class and no more, the verb "shall mean" has been used; and where Congress intended that a word should describe certain classes without any implication that it should exclude all others, the verb "shall include" has been used. For illustration, subsection 19 provides, "'persons' shall include corporations, except where otherwise specified; and officers, partnerships, and women, and when used with reference to the commission of acts which are herein forbidden shall include persons who are participants in the forbidden acts, and the agents, officers, and members of the board of directors or trustees, or other similar controlling

bodies of corporations;" It will be noted that although women are expressly mentioned in this subsection, men are not. No one has ever suggested, however, that this shows an intent to exclude men from the operation of the Bankruptcy Act. The reading of the entire section, which is printed in this brief at pages 10–13, will emphasize the distinction which has been stated.

In view of this distinction and of the fact that the verb "shall include" is used in subsection 9, which provides that "creditor" shall include anyone who owns a demand or claim provable in bankruptcy, it is submitted that there is no sound basis for the view adopted by the majority in the Circuit Court of Appeals that the word "creditors" in section 3a(1) must be limited in meaning to creditors having a provable claim at the date of the alleged act of bankruptcy.

The decision of the majority in the Court below also apparently overlooked the effect of the first four lines in section 1 which read as follows:—"The words and phrases used in this act and in proceedings pursuant thereto shall, *unless the same be inconsistent with the context,* be construed as follows:" (italics ours).

It is a well settled rule of construction that language used in a statute which has a settled and well known meaning, sanctioned by judicial decision, is presumed to be used in that sense by the legislative body.

*Kepner* v. *United States,* 195 U. S. 100, 124.

The expression "with intent to hinder, delay or defraud creditors" has such a well known meaning. Accordingly the word "creditors" in that expression, when interpreted consistently with the context, should be given the meaning which it is known to have as a part of that phrase. To give the word another meaning would be to interpret it so that it would be inconsistent with the context. The language used in the beginning of section 1 shows that no such interpretation was intended by Congress.

It is clear that at common law the petitioner was a creditor of Teresa Marotta from the date when it received the indemnity agreement and became surety on the fireworks bond.

*Thomson* v. *Crane*, 73 Fed. 327.
*Yeend* v. *Weeks*, 104 Ala. 331.
*Washington* v. *Norwood*, 128 Ala. 383.
*Whitehouse* v. *Bolster*, 95 Maine 458.

**D. The Court below erred in ruling that the claim of the petitioner under the indemnity agreement signed by Teresa Marotta was not a claim provable in bankruptcy at the date on which she transferred her property.**

The petitioner held an indemnity agreement under which Teresa Marotta had agreed to indemnify the petitioner against every claim arising from the execution of the proposed bond, and to place the petitioner in funds to meet the same before it should be required to make payment (R. 103, paragraph III). The petitioner contends that its claim, which is based upon the express contract of Teresa Marotta, is within the provisions of section 63 of the Bankruptcy Act. The material portion of this section is as follows:

> "a. Debts of the bankrupt may be proved and allowed against his estate which are (1) a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not, with any interest thereon which would have been recoverable at that date or with a rebate of interest upon such as were not then payable and did not bear interest; (2) due as costs taxable against an involuntary bankrupt who was at the time of the filing of the petition against him plaintiff in a cause of action which would pass to the trustee and which the trustee declines to prosecute after notice; (3) founded upon a claim for taxable costs incurred in good faith by a credi-

tor before the filing of the petition in an action to recover a provable debt; (4) founded upon an open account, or upon a contract express or implied; . . .

"b. Unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against the estate." (Act of July 1, 1898, c. 541, sec. 63, 30 Stat. 562: United States Code, Title 11, c. 7, sec. 103.)

While the precise question has not been decided by this Court, the recent case of *Maynard* v. *Elliott*, 283 U. S. 273, establishes the proposition that a claim based on a contract is not necessarily barred from proof because it is contingent. In the case at bar the petitioner's claim was liquidated within one month from the date of the act of bankruptcy and before the petition in bankruptcy was filed. It is submitted that being a claim founded on an express contract it was a provable claim on March 18, 1930, the date of the conveyance made by Teresa Marotta, and also on July 16, 1930, when the petition in bankruptcy was filed.

**E. The Court below erred in failing to find and rule that the petitioner was entitled to maintain the petition and that Teresa Marotta was properly adjudicated bankrupt by the District Court.**

The opinion of the majority in the Court below failed to consider any points in the case except those which have already been discussed in the preceding portions of this brief. It is submitted that if, as has already been argued, the Court below was in error on these points, the decision of the District Court should have been affirmed. As this brief is directed principally to the question as to whether the decision of the Court below should be reviewed, the point now under consideration will be treated only in a summary way. The statement of the facts which

is contained in the petition for certiorari shows the execution of the indemnity agreement, the execution by the petitioner of the fireworks bond in reliance on this agreement, the filing of this bond, the breach of the condition of the bond, and the payment by the petitioner of the sum of $6,653.78 in satisfaction of its obligations under the bond. This payment was made on April 18, 1930, before the petition in bankruptcy was filed. It also appears that the alleged bankrupt, within four months of the filing of the petition, and in view of the impending liability of the petitioner upon the bond, and the corresponding liability of the alleged bankrupt, transferred all her property with the specific intent of hindering, delaying and defrauding the petitioner. If, as has already been argued, the objections which were raised by the majority in the Circuit Court of Appeals are not valid, it would seem that the petitioner is entitled to have Teresa Marotta adjudicated a bankrupt. As the assignment of errors filed in the District Court on behalf of the alleged bankrupt raised a number of other defenses, however, these will be discussed briefly.

These defenses and the answers to them are stated below.

1. The alleged bankrupt claims that she was induced to sign the contract of indemnity by fraud.

The answer to this contention is a double one. In the first place, there is no finding that any fraud was, in fact, practiced on her but, on the contrary, the finding of the District Court was that she knew the nature of the instruments which she signed (R. 39). The second answer is that her signature was procured by the principal on the bond and not by any representative of the petitioner, and the petitioner had no notice of any fraud practiced upon her. Under these circumstances, the defense of fraud cannot be maintained.

*Magee* v. *Manhattan Life Ins. Co.*, 92 U. S. 93.

2. The second defense claimed by the alleged bankrupt is that she was not bound by the contract of indemnity because

the fireworks bond did not have the seal of the principal attached.

The answer to this contention is that the petitioner intended that the bond should be delivered in the condition in which it was delivered and Teresa Marotta had expressly agreed by the terms of the indemnity agreement that if the petitioner executed the "suretyship hereinbefore applied for, or other suretyship in lieu thereof," she would be responsible for the suretyship described in the indemnity agreement, and "all alterations, renewals, extensions or modifications thereof which may be requested or assented to by the Principal named in such obligation" (Indemnity Agreement, R. 103). The principal signed the bond which was filed, and thereby assented to the form of it. Under these circumstances, it is clear that whether or not the bond which was filed corresponded exactly with the one described in the indemnity agreement, the indemnitor was bound to the petitioner. It is also clear that the petitioner under the circumstances had no defense on the bond on account of lack of a seal against the name of the principal.

*United States* v. *Linn*, 15 Peters, 290.
*Goodyear Vulcanite Co.* v. *Bacon*, 148 Mass. 542.
*Inhabitants of Boothbay* v. *Giles*, 68 Maine 160.

3. The third defense claimed by the alleged bankrupt was that the bond was not delivered to the State Treasurer of Massachusetts prior to the exhibition at which Beatrice Ricci was injured.

The answer to this claim is that the District Court has expressly found on the evidence that the bond was filed at some time before September 26, 1927, which was the date of the exhibition at which the injury occurred (R. 39–40).

4. The fourth defense claimed by the alleged bankrupt was that the petitioner was not a creditor of the appellant having a provable claim on March 18, 1930 and that as Teresa Marotta had no other creditors, the conveyance made by her on that

date could not have been made with intent to hinder, delay or defraud any creditor.

This defense has already been discussed in the preceding portions of this brief.

5. The fifth defense claimed by the alleged bankrupt was based on the contention that one creditor was not entitled to prosecute an involuntary petition in bankruptcy, unless there were other creditors in existence at the date when the petition was filed.

The answer to this contention is that the Act expressly authorizes one creditor to bring a petition when the creditors are less than twelve in number. As the Act does not establish any exception to the effect that a creditor cannot bring a petition unless there are at least two creditors, no such exception can properly be interpolated into the act. The provision of the Bankruptcy Act which applies is section 59b which reads as follows:

> "b. Three or more creditors who have provable claims against any person which amount in the aggregate, in excess of the value of securities held by them, if any, to five hundred dollars or over; or if all of the creditors of such person are less than twelve in number, then one of such creditors whose claim equals such amount may file a petition to have him adjudged a bankrupt." (Act of July 1, 1898, c. 541, sec. 59, 30 Stat. 561; June 25, 1910, c. 412, sec. 101, 36 Stat. 841: United States Code, Title 11, c. 6, sec. 95.)

6. The remaining defense which was claimed by the alleged bankrupt was that the petitioner was barred from prosecuting its petition in bankruptcy because it had begun an action in the state courts seeking to set aside the conveyances alleged to be fraudulent.

There are two answers to this contention. The first is that if the defense were otherwise valid, it would be in the nature of

a plea in abatement and would not be available to the alleged bankrupt, who has gone to trial on the merits without pleading it. The second answer is that the pendency of a suit in a state court is no bar to proceedings concerning the same matter in a federal court having jurisdiction.

*McClellan* v. *Garland*, 217 U. S. 268, 282.
*W. D. Reeves Lumber Co.* v. *Leavenworth*, 248 Fed. 686.

There is an additional reason for the application of this rule where, as in the case at bar, the relief sought in the federal court is one which that court alone has jurisdiction to give.

*Photo Drama Motion Picture Co. Inc.* v. *Social Uplift Film Corporation*, 213 Fed. 374.

In the case at bar the petitioner has offered to surrender for the benefit of the estate in bankruptcy any equitable attachment which the petitioner may have on the property fraudulently conveyed. A creditor who is ready to surrender any such attachment may properly be a petitioning creditor.

In re *Murphy*, 225 Fed. 392.

The proceedings in the state court were intended to preserve the property for the trustee in bankruptcy by guarding against the danger that it might be transferred to *bone fide* purchasers, and were not intended to be adverse to the interests of a trustee in bankruptcy who might be appointed.

**F. The question involved is one of great importance.**

It often happens that a debtor has a few small creditors whom he can readily pay, and a large contingent liability. Illustrations are found in the cases of sureties on probate bonds and fidelity bonds, persons who have entered into hazardous contracts which are being performed at the moment but which may prove in the future to be beyond their power to perform, and, in general, indemnitors against possibilities. The decision

of the Circuit Court of Appeals, if it is not reversed, leaves the door open for such persons to evade the Bankruptcy Act by paying off all debts presently due and transferring all their property before their contingent liabilities mature.

## CONCLUSION.

It is respectfully submitted that for the reasons stated in the petition for certiorari and in this brief, this case calls for the exercise by this Court of its supervisory powers in order that the construction of the sections of the Bankruptcy Act in question may be settled, that the conflict may be removed which now exists as to what constitutes a transfer with intent to hinder, delay or defraud creditors within the meaning of the Bankruptcy Act, and that the right of the petitioner to maintain its petition in bankruptcy may be sustained; and that accordingly the writ of certiorari should be granted.

HARRY LeBARON SAMPSON,
*Counsel for the petitioner.*

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# Supreme Court of the United States.

OCTOBER TERM, 1932.

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No. 131.

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AMERICAN SURETY COMPANY OF NEW YORK Petitioner,

*v.*

TERESA MAROTTA.

---

## BRIEF FOR AMERICAN SURETY COMPANY OF NEW YORK, PETITIONER.

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# Supreme Court of the United States.

OCTOBER TERM, 1932.

AMERICAN SURETY COMPANY OF NEW YORK, PETITIONER.
v.
TERESA MAROTTA.

No. 131.

## BRIEF FOR AMERICAN SURETY COMPANY OF NEW YORK, PETITIONER.

### I.

### THE OPINIONS OF THE COURT BELOW.

This case comes before the Court for hearing on the merits on a writ of certiorari issued to review a judgment of the Circuit Court of Appeals for the First Circuit.

The opinions in the Circuit Court of Appeals are reported in 57 F. (2d) 829. The opinion of the majority of the Court is printed in the record at pages 133–139 and the dissenting opinion at pages 139–141.

### II.

### JURISDICTION OF THIS COURT.

The jurisdiction of this Court is based on the Judicial Code, section 240, as amended by the Act of February 13, 1925 (43 Stat. 936). The material portion of this section is as follows:

> "(a) In any case, civil or criminal, in a circuit court of appeals, or in the Court of Appeals of the District of Columbia, it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, whether Government or other litigant, to require by certiorari, either before or after a judgment or decree

by such lower court, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal."

The date of the judgment of the Circuit Court of Appeals which the petitioner seeks to review is April 4, 1932 (R. 141). The petition for certiorari was filed in this Court on June 3, 1932, and was granted on October 10, 1932.

## III.

## STATEMENT OF THE CASE.

This is a petition in bankruptcy originally brought by the petitioner, the American Surety Company of New York, in the District Court for the District of Massachusetts against Teresa Marotta (hereinafter called "the alleged bankrupt" and "the respondent"). The petitioner is a corporation organized under the laws of the State of New York and engaged in the business of acting as surety on bonds. The alleged bankrupt, Teresa Marotta, is a resident of Winthrop in the Commonwealth of Massachusetts.

The petition in bankruptcy was filed on July 16, 1930. The act of bankruptcy claimed is that the alleged bankrupt, on March 18, 1930, and within four months next preceding the date of the petition, transferred and conveyed certain real estate owned by her with intent to hinder, delay or defraud her creditors, including the petitioner (R. 1–4). The alleged bankrupt filed an answer denying that she had committed the act of bankruptcy alleged or that she was insolvent and denying that the petitioner was a creditor or had a provable claim against her (R. 4–5). The case was tried before a Special Master whose report is found in the record at pages 5–23. The District Court heard the case on the report of the Special Master and on the evidence taken before him, and on June 24, 1931, ordered that Teresa Marotta be adjudicated bankrupt (R. 33). The District

Court made special findings of fact printed in the record at pages 34–42, but rendered no opinion. On appeal taken by the respondent the Circuit Court of Appeals, by a final decree entered on April 4, 1932, reversed the decree of the District Court and instructed that court to dismiss the petition (R. 141). The Circuit Court of Appeals raised no question as to the accuracy of the findings of the District Court, but ruled that as a matter of law the facts found did not warrant an adjudication of bankruptcy (*cf.* R. 133–139).

**The Facts as Found by the District Court.**

The District Court found the material facts as follows (R. 34–42):

1. The petitioning creditor, the American Surety Company of New York, is a corporation organized under the laws of the State of New York and authorized to transact business in the Commonwealth of Massachusetts and engaged in the business of acting as surety on bonds.

2. The alleged bankrupt, Teresa Marotta, is a resident of Winthrop in the Commonwealth of Massachusetts and resided there for the greater portion of the six months preceding the filing of the petition. She was not at the date of the filing of the petition, or since that time, a wage earner or engaged chiefly in farming or tillage of the soil.

3. The creditors of Teresa Marotta at the time of the filing of the petition were less than twelve in number. At the time of the filing of the petition, the alleged bankrupt had no creditors other than the petitioner.

4. Teresa Marotta is the wife of Arcangelo Marotta. Both Teresa Marotta and Arcangelo Marotta are illiterate and unable to read or write either English or Italian or to sign their names except by a mark. Teresa Marotta, although she has lived in this country over thirty years, neither speaks nor understands English except to a very limited extent.

5. In 1906 Arcangelo Marotta purchased real estate, part of

that described in the alleged act of bankruptcy, which was put in the name of Teresa Marotta. This property, which was and is of considerable value, is situated on Lewis Street and Fulton Street in Boston and consists of two parcels, one of which is hereinafter referred to as the Lewis Street property, and the other as the Fulton Street property. In 1919, Arcangelo Marotta purchased a house in Winthrop, where he and his wife resided, which was also put in the name of Teresa Marotta. Arcangelo Marotta in 1906 and thereafter until the prohibition amendment, was in the saloon business. Since then he has been a wholesale dealer in ginger ale, moxie and "near beer." The details of management of all the real estate, collection of rents, payment of taxes and interest on the mortgages, have always been managed by him.

6. In the spring of 1927 one Mario Mogliani was in the fireworks business in Providence, Rhode Island. Antonio Natale, who was in the employ of Mogliani, went to Arcangelo Marotta, a few days before April 15, 1927, and, as a result of a talk with Arcangelo Marotta, took Arcangelo Marotta and Teresa Marotta to a lawyer with whom he was acquainted, Mr. William J. Good. Teresa Marotta, on April 15, 1927, executed, in Mr. Good's presence an instrument which was introduced in evidence as exhibit 6 (R. 90A). By the terms of this instrument (hereinafter referred to as the indemnity agreement) she agreed to indemnify the petitioner against any claim or liability arising from the execution of a fireworks bond to the Commonwealth of Massachusetts, on which bond Mario Mogliani was to be the principal and the petitioner was to be the surety, and against any claim or liability arising from other suretyship in lieu of said bond. Among the clauses in this indemnity agreement to which Mrs. Marotta agreed was the following:

> "VI. That this agreement shall cover not only the suretyship above recited, but all alterations, renewals, extensions or modifications thereof which may be requested or assented to by the principal named in such obligation."

7. At the time when Teresa Marotta executed the indemnity agreement, she also executed a statement of her financial condition which was introduced in evidence as exhibit 7 (R. 90D). In this financial statement her assets were given as follows: Cash, $8,000; Land and improvements, at market $75,000; Additional real estate, $15,500. Both papers were signed by Teresa Marotta by her mark in the presence of Mr. Good.

8. At the time the indemnity agreement, exhibit 6, was signed by Teresa Marotta, it did not contain the words on page 1, "Prov. R. I. April 18 1927", nor the date "April 18 1927" on the third page, nor the signature "Mario Mogliani", nor that of "Raymond Buss", witness to Mogliani. In all other respects the instrument was as it now appears.

9. The information now found in exhibit 7 with reference to the real estate and its value was given by Arcangelo Marotta to Mr. Good in the presence of Teresa Marotta and was written down by Mr. Good in the presence of both. Mr. Good was satisfied at the time that Mrs. Marotta knew the general substance and nature of the papers which she was signing. Mr. Good was not acting in the matter as an agent or attorney of the Surety Company and no agent or representative of the Surety Company was present at the time these papers were signed.

10. Both Arcangelo Marotta and Teresa Marotta knew the nature of the instruments which she signed.

11. Both Arcangelo Marotta and Teresa Marotta represented that she owned the property listed on exhibit 7 for the purpose of inducing the petitioner to accept the indemnity agreement, exhibit 6, and to write a bond in reliance on such representations.

12. After the execution of the two papers, exhibit 6 and exhibit 7, in Mr. Good's office, they were delivered to Mr. Natale who sent them to Raymond Buss in Providence, Rhode Island. Mr. Buss was the resident agent and manager of the American Surety Company for the State of Rhode Island. Exhibit 6 was

completed by employees of the petitioner in its Providence office as to the place and date on page 1 of exhibit 6, and was signed, sealed and delivered by Mogliani in Providence in the presence of Mr. Buss on April 18, 1927.

13. The "fireworks bond" referred to in exhibit 6 is the statutory bond required by the provisions of the Massachusetts statutes (Acts of 1921, c. 500) as a condition precedent to the giving of a permit for a public display of fireworks in Massachusetts.

14. On April 18, 1927, Raymond Buss, acting for the petitioner, delivered to Mario Mogliani a written instrument (hereinafter called "the bond") which was subsequently filed by Mogliani with the Treasurer and Receiver General of the Commonwealth of Massachusetts and approved by the State Fire Marshall and the Treasurer and Receiver General at some time before September 26, 1927.

15. Before this bond was delivered by Buss to Mogliani, it had been signed and sealed by the petitioner acting by its resident vice-president and its resident assistant secretary in Massachusetts, who were authorized to execute such bonds. It had also been signed by Mogliani, but had not been sealed by him by the affixing of a wafer or other seal. The word "Seal" which appears opposite his signature in exhibit 1 (R. 86A) was printed on the blank before he signed it.

16. In executing this bond, the petitioner relied on the indemnity agreement, exhibit 6, and on the statements as to the property of Teresa Marotta which were contained in the financial statement, exhibit 7.

17. The petitioner, acting through Raymond Buss, its authorized agent, delivered the bond to Mario Mogliani knowing that there was no seal against Mogliani's name and knowing also that Mogliani intended to file this bond immediately at the State House at Boston; and the petitioner intended to be bound by the bond in the condition in which it then was.

18. Said bond was filed with the Treasurer and Receiver

General of the Commonwealth of Massachusetts in the same condition in which it was delivered by Buss to Mogliani. A copy of said bond (except for the seal of the petitioner) was introduced in evidence as exhibit 1 and is made a part hereof. This copy which was a photostat, does not show the seal of the petitioner which was affixed to the original bond. The form of the bond, as it was delivered to the Treasurer and Receiver General, was assented to by Mario Mogliani, who had caused it to be delivered.

NOTE: A copy of the exhibit referred to in this finding of the District Court is found on page 86A of the record. The condition of the bond is as follows: "The Condition of this Obligation is such that if the said Mario Mogliani d/b as Centredale Fireworks Company, his heirs, executors and administrators, successors and assigns, shall pay any judgment obtained in an action brought against the said Principal for discharging, firing-off, exploding or displaying fireworks at any public exhibition or exhibitions thereof, for or on account of any loss, damage, or injury resulting to persons or property by reason of the said discharging, firing-off, exploding or displaying of said fireworks, at said public exhibition or exhibitions; provided that said judgment is obtained in an action brought within a period of twelve months following the date of the public exhibition or exhibitions, at which the cause of said action is alleged to have occurred, then this obligation shall be void, otherwise it shall remain in full force and effect."

19. On September 26, 1927, one Beatrice Ricci was injured by the discharging of fireworks under the direction of Mogliani at a public exhibition of fireworks in Everett, Massachusetts. Sometime in October, 1927, the petitioner notified Arcangelo Marotta, by letter, of the accident.

20. On March 15, 1928, Raymond Buss, acting for the petitioner, wrote Teresa Marotta a letter which was introduced in evidence as exhibit 3 (R. 87) and is made a part hereof, notifying her that a claim had been presented on behalf of Beatrice

Ricci and referring to the indemnity agreement which had been signed by Teresa Marotta.

21. On July 21, 1928, Arcangelo Marotta, who knew at the time the contents of the letter, exhibit 3, acting as agent for Teresa Marotta as well as for himself, caused to be written to Mr. Buss a letter which was introduced in evidence as exhibit 4 (R. 88A). Mr. Buss replied by a letter dated August 1, 1928, which was introduced in evidence as exhibit 5 (R. 89). Mr. and Mrs. Marotta received this letter but did not reply to it.

22. On April 12, 1928, Beatrice Ricci brought an action in the Superior Court for Middlesex County, Massachusetts against Mario Mogliani to recover for the injuries received by her on September 26, 1927, from the discharge of fireworks at said exhibition in Everett. A copy of the record in this case was introduced in evidence as exhibit 8 (R. 93–103). Before this suit was tried, the attorney for Mogliani told Arcangelo Marotta that Mrs. Marotta was on the bond, that the case was about to go to trial and he thought a verdict for a very large sum was likely to be rendered against the defendant, and he asked Marotta whether he wanted to get his own attorney. Marotta told Mogliani's attorney to go ahead and try the case. Arcangelo Marotta attended the trial of the case, which lasted several days. On March 4, 1930, the jury brought in a verdict for $10,000 against Mario Mogliani.

23. During the progress of the trial Arcangelo Marotta consulted Frank P. Fralli, an attorney-at-law, stating that his wife had signed a paper. After the verdict Marotta saw Fralli again and, as a result, Fralli went to Providence and investigated the situation and urged the attorney for Mogliani to move for a new trial. Such a motion was made and on March 29, 1930, the Court ordered the verdict cut down to $6500. As a part of the services performed for Marotta, Fralli negotiated with counsel for the plaintiff in the Ricci suit.

24. The acts of Arcangelo Marotta relating to the action

brought by Beatrice Ricci against Mario Mogliani were done as agent for Teresa Marotta.

25. The property which was purchased by Arcangelo Marotta, as stated in finding 5 above, belonged to Teresa Marotta from the time it was acquired and placed in her name in 1906 and 1919. This was the same real estate which was described in the financial statement, exhibit 7.

26. On February 23, 1928, Teresa Marotta executed a deed to her husband of property on Lewis Street, Boston, being the first two items described in the indemnity agreement, exhibit 7. This conveyance was not made with intent to hinder, delay or defraud creditors. This deed was introduced in evidence as exhibit 21 (R. 130).

27. On March 15, 1930, twelve days after the verdict in the Ricci suit, Arcangelo Marotta went to one Zottoli, a lawyer, and, as a result of the talk between them, a declaration of trust was drawn by Zottoli which Arcangelo Marotta executed on March 15, 1930. A copy of this declaration of trust was introduced in evidence as exhibit 14 (R. 118). By this instrument Marotta declared that he held the land described therein, together with any other property which he might afterward acquire as trustee to support and maintain the children of Arcangelo and Teresa Marotta. The trust, under its terms, was to terminate when the youngest child attained the age of twenty-one years and the property was to be distributed among the children.

28. On March 18, 1930, Teresa Marotta and Arcangelo Marotta conveyed to Pellegrino Muollo (by a quitclaim deed a copy of which was introduced in evidence as exhibit 10 (R. 110) the three parcels of real estate, namely (1) the home in Winthrop purchased in 1919 and still in the name of Teresa Marotta; (2) the Fulton Street property in Boston purchased in 1906 (being the parcel designated as 247–251 North Street in exhibit 7), title to which was still in her name; and (3) the Lewis Street property purchased in 1906 (being the first and

second items of real estate described in exhibit 7), which had been conveyed in 1928 by Mrs. Marotta to her husband. On the same day Muollo executed an alleged mortgage to Marciano Grella of the Winthrop home for a consideration stated as eight thousand dollars. A copy of this mortgage was introduced in evidence as exhibit 12 (R. 114). At the same time Muollo also executed an alleged mortgage on the Lewis Street property for twenty thousand dollars ($20,000) to Nicola Dello Russo. A copy of this mortgage was introduced in evidence as exhibit 11 (R. 112). Muollo then executed a quitclaim deed to Arcangelo Marotta, as trustee under the declaration of trust described in the preceding finding, of the Lewis Street and Fulton Street properties and the Winthrop home. A copy of this deed was introduced in evidence as exhibit 13 (R. 115). These instruments were all prepared by Mr. Zottoli, were all dated March 18, 1930, and were recorded on March 19, 1930, at which time said declaration of trust was also recorded.

29. The arrangements for the drawing of the documents referred to in the two preceding findings were made by Arcangelo Marotta acting as agent for Teresa Marotta.

30. All of the conveyances described, in finding 28, including the deed which was signed by Teresa Marotta, were made without consideration, and both Muollo, the grantee, and the two mortgagees were straws who acted as a favor to and at the request of Arcangelo Marotta. Teresa Marotta had no property on March 18, 1930, other than her interest in the real estate described in such conveyances. These conveyances, including the deed from Arcangelo Marotta and Teresa Marotta to Muollo, were made with the specific intent by Teresa Marotta to place the property conveyed beyond the reach of the petitioner, and to hinder, delay and defraud the petitioner.

31. On April 10, 1930, judgment was entered for the plaintiff in the suit of *Beatrice Ricci* v. *Mario Mogliani* for $6540.08, with costs taxed at $110.40, and execution was issued. Counsel for Beatrice Ricci made a demand through an officer on Mogliani

to collect this judgment and, being unsuccessful, made demand upon the petitioner. On April 18, 1930, an action was brought against the petitioner in the Municipal Court of the City of Boston in accordance with statutory requirements on the bond filed by Mogliani with the Treasurer and Receiver General, for the benefit of Beatrice Ricci. On the same day, after this suit was brought, the petitioner paid the amount of the Ricci execution to counsel for Beatrice Ricci. On April 30, 1930, an agreement for judgment for the plaintiff for $6653.78 was filed in said action in the Municipal Court of the City of Boston. This was the amount which had been paid by the petitioner on the Ricci execution.

32. On April 9, 1930, the petitioner filed a bill in equity in the Superior Court for Suffolk County, Massachusetts, against Teresa Marotta and others, praying that the conveyances and mortgages described in finding 28 above should be set aside as fraudulent, and filed a notice of this bill in the Registry of Deeds for Suffolk County. No injunction was issued in this suit and it has not been tried.

33. On May 15, 1930, after the payment by the petitioner of the amount of the Ricci judgment, the petitioner filed a second bill in equity in the Superior Court for Suffolk County against Teresa Marotta and others, seeking to recover the amount paid by the petitioner and to reach and apply the real estate transferred by said conveyances in satisfaction of the petitioner's claims against Teresa Marotta under her indemnity agreement. The petitioner alleged in this bill that said real estate had been fraudulently conveyed by Teresa Marotta. In this suit a temporary injunction was issued on May 22, 1930, against Arcangelo Marotta and the straw mortgagees, restraining them from conveying or encumbering said real estate or foreclosing the mortgages and notice of the bringing of this bill in equity was also filed in the Registry of Deeds for Suffolk County on May 15, 1930. This suit is still pending and has not been tried.

34. As a result of the conveyances made on March 18, 1930, Teresa Marotta was then insolvent.

Certain of these findings were objected to by the respondent as not warranted by the evidence. The objections raised to these findings are discussed later in this brief.

### The Decision of the Circuit Court of Appeals.

The Circuit Court of Appeals reversed the decision of the District Court, which had adjudicated Teresa Marotta to be a bankrupt, and ordered that the petition in bankruptcy be dismissed. The majority in the Circuit Court of Appeals held that the petitioner's claim was contingent on March 18, 1930, the date of the alleged transfer; that therefore the petitioner had no claim provable in bankruptcy on that date; and that as there were no other creditors of Teresa Marotta at the time, the transfer was not an act of bankruptcy. The decision is based solely on the ground that a fraudulent transfer, to constitute an act of bankruptcy, must hinder, delay or defraud a creditor *holding a claim provable in bankruptcy at the time the transfer is made.* The majority of the Court, while conceding that a transfer made with a specific intent to defraud a contingent creditor or a subsequent creditor may be set aside at common law and under the Statute of Elizabeth, held that such a transfer is not an act of bankruptcy under section 3a (1) of the Bankruptcy Act (R. 133–139). Morton J. dissented, contending that the first act of bankruptcy is identical with the fraudulent conveyance of the Statute of Elizabeth and the common law (R. 139–141).

## IV.

## SPECIFICATION OF ERRORS.

The petitioner contends that the Court below erred in the following respects:

1. The Court below erred in ruling that the transfer by the alleged bankrupt, Teresa Marotta, of all her property made with the specific intent to hinder, delay and defraud the petitioner, within four months of the filing of the petition, would not constitute an act of bankruptcy under section 3a (1) of the Bankruptcy Act unless the petitioner had at the time of the transfer a claim which would be provable in bankruptcy.

2. The Court below erred in ruling that the term "creditors" as used in section 3a (1) of the Bankruptcy Act was confined to creditors having claims which would be provable in bankruptcy at the date of the transfer referred to in said section.

3. The Court below erred in ruling that the claim of the petitioner under the indemnity agreement signed by Teresa Marotta was not a claim which was provable in bankruptcy at the date on which she transferred her property.

4. The Court below erred in failing to find and rule that the petitioner was a creditor of Teresa Marotta on March 18, 1930, the date of the transfer which she made.

5. The Court below erred in failing to find and rule that the conveyance made by Teresa Marotta on March 18, 1930, was made with intent to hinder, delay and defraud a creditor and was an act of bankruptcy.

6. The Court below erred in failing to find and rule that the petitioner was a creditor entitled to maintain the petition at the time when the petition was filed, and that Teresa Marotta was properly adjudicated bankrupt by the District Court for the District of Massachusetts.

## V.

## ARGUMENT.

The question involved is one of great importance. It often happens that a debtor has a few small creditors whom he can readily pay, and a large contingent liability. Illustrations are found in the cases of sureties on probate bonds and fidelity bonds, persons who have entered into hazardous contracts which are being performed at the moment but which may prove in the future to be beyond their power to perform, and, in general, indemnitors against possibilities. The decision of the Circuit Court of Appeals, if it is not reversed, leaves the door open for such persons to evade the Bankruptcy Act by paying off all debts presently due and transferring all their property before their contingent liabilities mature.

The petitioner contends that the Circuit Court of Appeals was in error in ruling that the transfer by the alleged bankrupt of her property with the specific intent to hinder, delay or defraud the petitioner would not constitute an act of bankruptcy unless the petitioner had at the time a claim which would be provable in bankruptcy, and was also in error in ruling that the claim which the petitioner then had was not one which would be provable in bankruptcy. The petitioner further contends that on the facts found by the District Court and the record in the case the Circuit Court of Appeals should have found and ruled that the petitioner was a creditor of Teresa Marotta when she transferred her property and when the petition was filed; that this transfer was made with intent to hinder, delay or defraud a creditor and was an act of bankruptcy; that the petitioner was entitled to maintain the petition; and that the respondent was properly adjudicated a bankrupt by the District Court.

## Statutes Involved.

The principal statutes involved are as follows:

Section 3. Acts of Bankruptcy.— a. Acts of bankruptcy by a person shall consist of his having (1) conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, any part of his property with intent to hinder, delay, or defraud his creditors, or any of them; . . . (U. S. Code, Title 11, c. 3, § 21: Act of July 1, 1898, c. 541, § 3, 30 Stat. 546).

Section 59. b. Three or more creditors who have provable claims against any person which amount in the aggregate, in excess of the value of securities held by them, if any, to five hundred dollars or over; or if all of the creditors of such person are less than twelve in number, then one of such creditors whose claim equals such amount may file a petition to have him adjudged a bankrupt. (Act of July 1, 1898, c. 541, § 59, 30 Stat. 561; June 25, 1910, c. 412, § 101, 36 Stat. 841: United States Code, Title 11, c. 6, § 95.)

Section 1. Meaning of words and phrases. The words and phrases used in this title and in proceedings pursuant hereto shall, unless the same be inconsistent with the context, be construed as follows: (1) "A person against whom a petition has been filed" shall include a person who has filed a voluntary petition; (2) "adjudication" shall mean the date of the entry of a decree that the defendant, in a bankruptcy proceeding, is a bankrupt, or if such decree is appealed from, then the date when such decree is finally confirmed; (3) "appellate courts" shall include the circuit courts of appeals of the United States, the Court of Appeals of the District of Columbia, the supreme courts of the Territories, and the Supreme Court of the United States; (4) "bankrupt" shall include a person against whom an involuntary petition or an application to set a composition aside or to revoke a discharge has been filed, or who has filed a voluntary petition, or who has been adjudged a bankrupt; (5) "clerk" shall mean the clerk of a court of bankruptcy; (6) "corporations" shall mean all bodies having any of the powers and privileges of private corporations not possessed by individuals or partnerships

and shall include limited or other partnership associations organized under laws making the capital subscribed alone responsible for the debts of the association, joint stock companies, unincorporated companies and associations, and any business conducted by a trustee, or trustees, wherein beneficial interest or ownership is evidenced by certificate or other written instrument; (7) "court" shall mean the court of bankruptcy in which the proceedings are pending, and may include the referee; (8) "courts of bankruptcy" shall include the district courts of the United States and of the Territories and possessions to which this title is or may after July 1, 1898, be applicable, the Supreme Court of the District of Columbia, and the United States Court of Alaska; (9) "creditor" shall include any one who owns a demand or claim provable in bankruptcy, and may include his duly authorized agent, attorney, or proxy; (10) "date of bankruptcy," or "time of bankruptcy," or "commencement of proceedings," or "bankruptcy," with reference to time, shall mean the date when the petition was filed; (11) "debt" shall include any debt, demand, or claim provable in bankruptcy; (12) "discharge" shall mean the release of a bankrupt from all of his debts which are provable in bankruptcy, except such as are excepted by this title; (13) "document" shall include any book, deed, or instrument in writing; (14) "holiday" shall include Christmas, the Fourth of July, the twenty-second of February, and any day appointed by the President of the United States or the Congress of the United States as a holiday or as a day of public fasting or thanksgiving; (15) a person shall be deemed insolvent within the provisions of this title whenever the aggregate of his property, exclusive of any property which he may have conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, with intent to defraud, hinder, or delay his creditors, shall not, at a fair valuation, be sufficient in amount to pay his debts; (16) "judge" shall mean a judge of a court of bankruptcy, not including the referee; (17) "oath" shall include affirmation; (18) "officer" shall include clerk, marshal, receiver, referee, and trustee, and the imposing of a duty upon or the forbidding of an act by any officer shall include his successor and any person authorized

by law to perform the duties of such officer; (19) "persons" shall include corporations, except where otherwise specified, and officers, partnerships, and women, and when used with reference to the commission of acts which are herein forbidden shall include persons who are participants in the forbidden acts, and the agents, officers, and members of the board of directors or trustees, or other similar controlling bodies of corporations; (20) "petition" shall mean a paper filed in a court of bankruptcy or with a clerk or deputy clerk by a debtor praying for the benefits of this title, or by creditors, alleging the commission of an act of bankruptcy by a debtor therein named; (21) "referee" shall mean the referee who has jurisdiction of the case or to whom the case has been referred, or any one acting in his stead; (22) "conceal" shall include secrete, falsify, and mutilate; (23) "secured creditor" shall include a creditor who has security for his debt upon the property of the bankrupt of a nature to be assignable under this title, or who owns such a debt for which some indorser, surety, or other persons secondarily liable for the bankrupt has such security upon the bankrupt's assets; (24) States shall include the Territories and possessions to which this title is, or may after July 1, 1898, be, applicable, Alaska, and the District of Columbia; (25) "transfer" shall include the sale and every other and different mode of disposing of or parting with property, or the possession of property, absolutely or conditionally, as a payment, pledge, mortgage, gift, or security; (26) "trustee" shall include all of the trustees of an estate; (27) "wage earner" shall mean an individual who works for wages, salary, or hire, at a rate of compensation not exceeding $1,500 per year; (28) words importing the masculine gender may be applied to and include corporations, partnerships, and women; (29) words importing the plural number may be applied to and mean only a single person or thing; (30) words importing the singular number may be applied to and mean several persons or things. (United States Code, Title 11, c. 1, § 1: July 1, 1898, c. 541, § 1, 30 Stat. 544; Apr. 12, 1900, c. 191, § 34, 31 Stat. 85; Mar. 3, 1909, c. 269, § 1, 35 Stat. 838; May 27, 1926, c. 406, § 1, 44 Stat. 662.)

Other statutes are quoted below in those portions of the argument to which they particularly apply.

**A. The Circuit Court of Appeals erred in ruling that the transfer by the alleged bankrupt of all her property with the specific intent to hinder, delay or defraud the petitioner would not constitute an act of bankruptcy unless the petitioner had at the time of the transfer a claim which would be provable in bankruptcy.**

The reasoning of the majority in the Circuit Court of Appeals is as follows:

Section 3 of the Bankruptcy Act provides that the first act of bankruptcy shall consist of a conveyance by a person of any part of his property "with intent to hinder, delay or defraud his creditors, or any of them". Section 1 (9) of the Act provides that as used in the Act the word "creditor" "shall include anyone who owns a demand or claim provable in bankruptcy . . ." From these premises the majority of the Court drew the inference that the word "creditors" in section 3 meant only those persons having claims provable in bankruptcy and that the expression "hinder, delay or defraud his creditors, or any of them" in that section did not apply to a transfer made with an actual intent to defraud a person who was only a contingent creditor having no provable claim at the time. The Court ruled that on March 18, 1930, the petitioner's claim against the respondent was contingent, that the actual intent to defraud the petitioner which the respondent had was not an intent to defraud a "creditor" as defined in the Bankruptcy Act; and that as the respondent had no other creditors at the time of the transfer which she made, this transfer was not an act of bankruptcy (R. 137–139).

It is submitted that this ruling as to the meaning of the expression "hinder, delay or defraud his creditors" was erroneous, and that the expression, when correctly interpreted, covers such a transfer as is found in the case at bar. It is clear that at common law and under the Statute of Elizabeth, which was declaratory of the common law, a transfer is voidable if made

with actual intent to defraud a creditor having a contingent claim or even a future creditor. This was recognized in both the majority and the minority opinions of the Circuit Court of Appeals (R. 138–140). A few of the decisions which support this proposition are cited below:

*McLaughlin* v. *The Bank of Potomac*, 7 How. 220.
*Smith* v. *Vodges*, 92 U. S. 183.
*Mowry* v. *Reed*, 187 Mass. 174.
*Thomson* v. *Crane*, 73 Fed. 327.

It is an established rule of construction that language used in a statute which has a settled and well known meaning, sanctioned by judicial decision, is presumed to be used in that sense by the legislative body.

*Kepner* v. *United States*, 195 U. S. 100, 124.

It is submitted that the language of section 1 (9) of the Bankruptcy Act does not require that the word "creditors" in section 3 a(1) shall be limited to persons having provable claims. In the first place it is to be noted that the verb "shall include" as used in section 1 does not necessarily mean "shall include only". A careful distinction is made in section 1 in the use of the verbs "shall include" and "shall mean". Where Congress intended that a word should describe a definite class and no more, the verb "shall mean" is used; and where the intention was that a word should describe certain classes without any implication that it should exclude all others, the verb "shall include" has been used. For illustration, subsection 19 provides, " 'persons' shall include corporations, except where otherwise specified, and officers, partnerships, and women, and when used with reference to the commission of acts which are herein forbidden shall include persons who are participants in the forbidden acts, and the agents, officers, and members of the board of directors or trustees, or other similar controlling bodies of corporations;". It will be noted that although women are

expressly mentioned in this subsection, men are not. No one has ever suggested, however, that this shows an intent to exclude men from the operation of the Bankruptcy Act. Again subsection 17 reads "'oath' shall include affirmation". It could not be argued seriously that "oath" means affirmation *only*. A reading of section 1 as a whole (printed in this brief at pages 15–17) will emphasize the distinction between the use of the verbs "shall mean" and "shall include". In subsections 6 and 7 above, both verbs are used in a way that further illustrates the point which has been made. In view of the fact that the verb "shall include" is used in subsection 9 and the verb "shall mean" is not used, it is submitted that there is no sound basis for the reasoning that was adopted by the majority in the Circuit Court of Appeals.

The decision of the majority in the Court below also apparently overlooked the effect of the first four lines of section 1 which read as follows: — "The words and phrases used in this title and in proceedings pursuant thereto shall, *unless the same be inconsistent with the context*, be construed as follows:" (italics ours).

The word "creditors" as used in the expression "with intent to hinder, delay or defraud creditors" has a well known judicial meaning. To give the word another meaning is to interpret it so that it is inconsistent with its context. The language used at the beginning of section 1 shows that no such interpretation was intended by Congress.

The proposition that the expression "hinder, delay or defraud his creditors" as used in the Bankruptcy Act is to be interpreted in its common law meaning is strongly supported by the decision of this Court in the case of *Coder* v. *Arts*, 213 U. S. 223. In that case the bankrupt, knowing that he was insolvent, gave a mortgage which constituted a preference of the mortgagee over other creditors. The mortgage was not made with any actual intent to hinder, delay or defraud creditors, and the mortgagee had no cause to believe that the mortgagor

was insolvent. The trustee in bankruptcy claimed that the mortgage was void under the following provisions of section 67(e) of the Bankruptcy Act:

> "e. That all conveyances, transfers, assignments, or incumbrances of his property, or any part thereof, made or given by a person adjudged a bankrupt under the provisions of this act, subsequent to the passage of this act and within four months prior to the filing of the petition, with the intent and purpose on his part to hinder, delay, or defraud his creditors, or any of them, shall be null and void as against the creditors of such debtor, except as to purchasers in good faith and for a present fair consideration; . . ."

It was argued that the intent on the part of the bankrupt to hinder, delay or defraud creditors must be presumed because this was the necessary effect of the mortgage. This Court was of the opinion, however, that the expression "with the intent and purpose on his part to hinder, delay or defraud his creditors" used in section 67e referred to those transfers which according to the common law and the Statute of Elizabeth were regarded as fraudulent, and that as a mortgage given to an existing creditor was not a fraudulent conveyance under the common law and the Statute of Elizabeth in the absence of an actual intent to hinder, delay or defraud, the mortgage in question was valid. In discussing this issue the Court said (213 U. S. 223, at p. 242),

> "We are of opinion that Congress, in enacting § 67e, and using the terms 'to hinder, delay or defraud creditors,' intended to adopt them in their well-known meaning as being aimed at conveyances intended to defraud. In § 60 merely preferential transfers are defined, and the terms on which they may be set aside are provided; in § 67e, transfers fraudulent under the well-recognized principles of the common law and the statute of Elizabeth are invalidated. The same terms are used in § 3, subdivision 1, in which it is

made an act of bankruptcy to transfer property with intent to hinder, delay or defraud creditors. Such transfers have been held to be only those which are actually fraudulent. It was so held in *Lansing Boiler & Engine Works* v. *Ryerson*, 128 Fed. Rep. 701. Considering the language, which is identical with that in §67e, the Circuit Court of Appeals, speaking through Judge Severens, said:

'The language of subsection 1 of section 2 is the familiar language of statutes against conveyances fraudulent as against creditors, and we think there can be no doubt that Congress intended the words employed should have the same construction and effect as have for a long period of time been attributed to those words. *Githens* v. *Shiffler*, 112 Fed. Rep. 505.' . . ."

The case of *Lansing Boiler & Engine Works* v. *Ryerson*, 128 Fed. Rep. 701, which is cited in *Coder* v. *Arts*, is a decision of the Circuit Court of Appeals for the Sixth Circuit. In that case the question arose as to whether a certain mortgage given by a corporation constituted an act of bankruptcy under section 3a(1) of the Bankruptcy Act. The Court held that the mortgage in question would not be fraudulent unless there was proof of an actual intent to defraud. The case rests squarely on the ground that a transfer with intent to hinder, delay or defraud which constitutes the first act of bankruptcy which is referred to in section 3a(1) is identical with the transfers which were void under the common law and the Statute of Elizabeth.

It is clear that at common law a surety is the creditor of a person against whom he has a right of indemnity, and is entitled to protection against fraudulent conveyances by his indemnitor from the date when he becomes a surety.

*Thomson* v. *Crane*, 73 Fed. 327.
*U. S. Fidelity & Guaranty Co.* v. *Centropolis Bank*, 17 F. (2d), 913.
*Yeend* v. *Weeks*, 104 Ala. 331.
*Washington* v. *Norwood*, 128 Ala. 383.
*Whitehouse* v. *Bolster*, 95 Maine 458.
*American Surety Co. of New York* v. *Hattrem*, 138 Ore. 358.

**B. The Circuit Court of Appeals erred in ruling that the claim of the petitioner under the indemnity agreement signed by Teresa Marotta was not provable in bankruptcy at the date on which she transferred her property because it was contingent.**

The conclusion reached by the Circuit Court of Appeals depends on two propositions. The first, namely that a transfer with a specific intent to defraud the petitioner would not be an act of bankruptcy unless the petitioner had a provable claim at the time, has already been discussed. The second proposition on which the decision depends is that the claim which the petitioner had was not provable at the time of the transfer. It is submitted that this proposition also cannot be sustained.

Before March 18, 1930, the date on which the respondent transferred her property, the bond signed by the petitioner had been filed, the injury to Beatrice Ricci had taken place, suit had been brought by her against Mogliani and a verdict had been rendered in that suit for $10,000. Judgment was not entered in the case until April 10, 1930. In the meantime the Court had reduced the amount of the verdict to $6500 (R. 37–41).

The petitioner contends that on March 18, 1930, it had a provable claim on the express contract of indemnity of Teresa Marotta which was within the provisions of section 63 of the Bankruptcy Act. The material portion of this section is as follows:

> "a. Debts of the bankrupt may be proved and allowed against his estate which are (1) a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not, with any interest thereon which would have been recoverable at that date or with a rebate of interest upon such as were not then payable and did not bear interest; (2) due as costs taxable against an involuntary bankrupt who was at the time of the filing of the petition against him plaintiff in a cause

of action which would pass to the trustee and which the trustee declines to prosecute after notice; (3) founded upon a claim for taxable costs incurred in good faith by a creditor before the filing of the petition in an action to recover a provable debt; (4) founded upon an open account, or upon a contract express or implied; . . .

"b. Unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against the estate." (Act of July 1, 1898, c. 541, § 63, 30 Stat. 562: United States Code, Title 11, c. 7, § 103.)

While the precise question has not been decided by this Court, the recent case of *Maynard* v. *Elliott*, 283 U. S. 273, establishes the proposition that a claim based on a contract is not necessarily barred from proof because it is contingent. That a claim based on an express contract of indemnity is unliquidated is not a fatal objection to its being a provable debt.

*Williams* v. *U. S. Fidelity & Guaranty Co.*, 236 U. S. 549.

In the case at bar the petitioner's claim was liquidated within one month from the date of the act of bankruptcy, and before the petition in bankruptcy was filed. It is submitted that this claim, being founded on an express contract, was a provable claim on March 18, 1930, the date of the conveyance made by Teresa Marotta.

**C. On the facts found by the District Court and the record in the case the Circuit Court of Appeals should have found and ruled that the petitioner was a creditor of Teresa Marotta when she transferred her property and when the petition was filed; that this transfer was made with intent to hinder, delay or defraud a creditor and was an act of bankruptcy; that the petitioner was entitled to maintain the petition; and that the respondent was properly adjudicated a bankrupt by the District Court.**

Up to this point the case has been considered in this brief, as it was by the Circuit Court of Appeals, on the assumption that the petitioner had a provable claim against the respondent at least as early as April 18, 1930, when the petitioner paid the amount of the judgment which was obtained in the Ricci case.

The respondent claims, however, that she never became indebted to the petitioner under the indemnity agreement, and raises this and other issues in the assignments of error filed in her appeal from the decision of the District Court.

## The Respondent's Assignments of Error, and Discussion of Issues Raised by Them.

Twenty-eight assignments of error were filed for the alleged bankrupt in connection with her appeal to the Circuit Court of Appeals (R. 44–47). These raise in various forms the following issues.

1. Whether the American Surety Company was a creditor of Teresa Marotta when the petition was filed (on July 16, 1930) having a provable claim of $500 or more (Assignments 3, 10, 11, 12, 13, 18, 19, 21, 26). It is not disputed that if the petitioner was a creditor its claim exceeded $500.

2. Whether the petitioner was a creditor at the time of the alleged act of bankruptcy (Assignments 4, 25).

3. Whether the conveyance of real estate made by Teresa

**Marotta on March 18, 1930 constituted an act of bankruptcy (Assignments 20, 22, 23, 24, 27).**

**4. Whether the proceedings should be dismissed because the alleged bankrupt had only one creditor, the petitioner, at the time when the alleged act of bankruptcy was committed and at the time when the petition was filed (Assignments 5, 6, 7, 8, 9, 17).**

**5. Whether the petitioner was barred from maintaining the petition because at the time it was filed the petitioner had two bills in equity pending in the Superior Court for Suffolk County seeking to set the conveyance in question aside as fraudulent, in both of which notices had been filed in the Registry of Deeds, and in one of which a temporary injunction had been issued (Assignments 14–17).**

**6. Whether on the record the adjudication was warranted (Assignments 1, 2, 28).**

It is submitted that the petitioner was a creditor of Teresa Marotta when she transferred her property, and was a creditor entitled to maintain the petition when the petition was filed; that the conveyance made by Teresa Marotta was an act of bankruptcy; and that the respondent was properly adjudicated bankrupt by the District Court. The issue as to whether the petitioner was a creditor when the transfer was made has already been discussed. The other issues are considered below.

**1. The petitioner was a creditor of Teresa Marotta having a provable claim in excess of $500 at the date when the petition was filed; and was therefore qualified to maintain the petition irrespective of whether it had such a claim when the act of bankruptcy was committed.**

The facts not in dispute show,

(1) Teresa Marotta on April 15, 1930 executed the indemnity agreement, Exhibit 6 (R. 90A) by which she agreed to in-

demnify the petitioner against any loss arising from execution of a fireworks bond for Mario Mogliani to run to the State of Massachusetts (R. 35).

(2) Relying on this indemnity agreement the petitioner, on April 18, 1927, executed the fireworks bond of which exhibit 1 (R. 86A) is a copy, except that the exhibit does not show the seal of the petitioner which was affixed to the original bond. This bond was filed with the Treasurer and Receiver General of Massachusetts in accordance with the requirements of the laws of Massachusetts (for the material portion of the statute see p. 34 below). The bond was conditioned on the payment by Mario Mogliani of any judgment obtained in an action against him for damage to persons or property resulting from the discharging of fireworks at any public exhibition, provided that the action was brought within twelve months of the exhibition (R. 36–38).

(3) On September 26, 1927 Beatrice Ricci was injured by the discharge of fireworks under the direction of Mario Mogliani at a public exhibition held at Everett, Massachusetts. On April 12, 1928 Beatrice Ricci brought an action against Mogliani in the Superior Court for Middlesex County, Massachusetts to recover for this injury. After a verdict in her favor for $10,000 which was reduced by the Court to $6,500, a judgment was entered in this action on April 10, 1930 against Mogliani for $6,540.08 with costs of $110.40 (Findings 19, 22, 23, 31, R. 38–41; see Exhibit 8, R. 91–103).

(4) Demand was made on Mogliani to pay the judgment. When he failed to do so suit was brought on the bond against the petitioner in the Municipal Court of the City of Boston in the name of the Treasurer and Receiver General for the benefit of Beatrice Ricci. After this suit was brought the petitioner, on April 18, 1930, paid the amount of the judgment to the attorney of record in the suit on the bond, who was also attorney of record for Beatrice Ricci in the suit against Mogliani (Finding 31, R. 41; Testimony of DiCecca, R. 59–60).

Although the foregoing facts are not in dispute, it is contended for the respondent that the petitioner is not a creditor of Teresa Marotta. The reasons assigned for this contention may be summarized as follows:

(a) The respondent claims that she was induced by fraud to execute the indemnity agreement, exhibit 6.

(b) The respondent claims that there was a failure of consideration because the instrument, exhibit 1, filed with the Treasurer and Receiver General was not within the terms of the indemnity agreement, exhibit 6, because it was not sealed by the principal.

(c) The respondent claims that the instrument filed with the Treasurer and Receiver General was not a bond, and the petitioner was therefore under no obligation to pay the judgment recovered by Beatrice Ricci against Mario Mogliani.

(d) The respondent claims that there was no evidence that the alleged bond executed by the petitioner was filed before Beatrice Ricci was injured.

These claims will be discussed in the order stated.

(a) The contention that the respondent was induced to execute the indemnity agreement by fraud is not supported by the facts.

The only testimony having any tendency to show that the respondent did not understand what she was doing, or that she was misled when she executed exhibit 6 was that of Mr. and Mrs. Marotta. The Special Master who heard the witnesses found specifically that the testimony of Mr. Marotta was far from reliable and that his alleged ignorance and that of his wife in connection with the signing of exhibit 6 is not credible (R. 15). He expressly declined to find that Antonio Natale (who was the only person accused of fraud in the testimony of the appellant and her husband) was guilty of any fraud, and he found that Natale was not an agent of the petitioner (R. 17). The District Court found that none of the persons present when this document was signed were agents of the Surety Com-

pany (Finding 9, R. 36). The Court also found that both Mr. and Mrs. Marotta knew the nature of the instruments which she signed (Finding 10, R. 36). The testimony of Arcangelo Marotta and of the respondent with respect to the circumstances under which she signed the indemnity agreement, exhibit 6, and the financial statement, exhibit 7, was contradicted in material respects by other witnesses (see testimony of William J. Good, R. 53–55, 80; Antonio Natale, R. 57–59, 81; Michael Vallanti, R. 82). The story told by Mr. and Mrs. Marotta is that Antonio Natale procured the signature of the respondent to the indemnity agreement, exhibit 6, and the financial statement exhibit 7, by representing to her that she was to become responsible on an attachment bond for $1000, and that when Mr. and Mrs. Marotta went to Mr. Good's office, where she signed these documents, the papers were there all prepared and she merely signed them and acknowledged them (R. 68–69, 73, 78–80). The cross-examination of Arcangelo Marotta however, showed conclusively that the financial statement, exhibit 7, contained information as to the real estate and its income which was known only to himself and his wife (R. 73). Mr. Good testified that he wrote down the details as to the property which appear in the financial statement, exhibit 7, from information furnished by the Marottas at the interview in question (R. 53–54). It also appeared that on March 15, 1928 Mr. Buss, the manager of the petitioner at Providence, sent a letter to Mrs. Marotta (Ex. 3, R. 87) in which he expressly referred to the indemnity agreement, exhibit 6, as an agreement to hold the petitioner harmless in connection with the bond for $15,000 required by the State of Massachusetts for the giving of a fireworks exhibition. This letter had at the top the file number used by the petitioner for this bond, 693033-B. On July 31, 1928, Arcangelo Marotta, acting for himself and as agent for his wife, wrote a letter to Mr. Buss, exhibit 4 (R. 88A) which referred to the same file number (which must have been copied from exhibit 3) and to an application for another bond made in

1928 for Antonio Natale and Mario Mogliani. On August 1, 1928 Mr. Buss sent a letter to Mr. and Mrs. Marotta (exhibit 5, R. 89) stating that the application for the later bond had not been used and again referring to the indemnity agreement signed by Mrs. Marotta in 1927 on behalf of Mr. Mogliani. The testimony of Mr. Marotta as to this correspondence is found at pages 70–71 in the record. Mr. and Mrs. Marotta had a daughter who could read English. There is no evidence that either Mr. or Mrs. Marotta ever questioned that Mrs. Marotta had executed such an indemnity agreement as is disclosed in the evidence until they testified at the trial.

If Mr. and Mrs. Marotta had thought that all that she signed was an indemnity agreement relating to an attachment bond for $1000, they would have said so promptly when they received exhibit 3 (R. 87), the letter of March 15, 1928, from Mr. Buss, which informed Mrs. Marotta that she had executed an indemnity agreement to hold the petitioner harmless in connection with a fireworks bond for $15,000, and that a claim had been made for injuries to Beatrice Ricci. Instead of that, Mr. Marotta, acting for himself and his wife, wrote the letter, exhibit 4 (R. 88A), referring only to a later bond (or application for a bond) which Mr. and Mrs. Marotta had signed for Natale and Mogliani.

There was also testimony in the case that $800 was paid to Arcangelo Marotta as consideration for Teresa Marotta's going on the bond in the case at bar (R. 57, 58, 82).

On the evidence which has been referred to, it is submitted that the findings against the respondent which were made in the District Court with respect to her claim of fraud were required by the evidence. As these findings were made by the trial court on conflicting evidence, they should not be disturbed on appeal.

*Lawson* v. *U. S. Mining Co.*, 207 U. S. 1, 12.
*Butte & Superior Copper Co. Ltd.* v. *Clark-Montana Realty Co.*, 249 U. S. 12, 30.

*Harding* v. *Federal National Bank*, 31 F. (2d) 914.
*Boston National Bank* v. *Early*, 17 F. (2d) 691.
*Watchmaker* v. *Barnes*, 259 Fed. Rep. 783.
In Re *Noyes Bros.*, 127 Fed. Rep. 286.

It is further to be observed that the testimony of Mr. and Mrs. Marotta that she had been misled by Natale, even if it had been believed, would not have voided her contract of indemnity. Natale, who procured the respondent's signature to the indemnity agreement was employed by Mogliani, the principal on the bond. He did not represent the petitioner. "The obligee's right to hold the surety does not depend on representations made by the principal on his own behalf without knowledge of the obligee." *Hudson* v. *Miles*, 185 Mass. 582, 587.

*Rodovsky* v. *Fall River Savings Bank*, 196 Mass. 557.
*Martin* v. *Campbell*, 120 Mass. 126.

The mere fact that Mrs. Marotta signed by a mark did not put the petitioner on notice that she did not understand the terms of the instrument. If such a contention were valid, no one could safely take title to a piece of land where any deed in the chain of title appeared from the records in the registry of deeds to be signed by a mark. Signature by mark was notice that Mrs. Marotta could not write her name; it was not notice that she had no information as to the nature of the instrument. Furthermore, the person who signs a written instrument cannot avoid its legal effect on the ground that he did not read it or understand it, in the absence of fraud on the part of the other party to the instrument.

*Rodovsky* v. *Fall River Savings Bank*, 196 Mass. 557.
*Waverly Lumber Co.* v. *Piantedosi*, 262 Mass. 377.
*Wilkisius* v. *Sheehan*, 258 Mass. 240.

The argument made in the Court below that the petitioner concealed the nature of the obligation from the respondent is

equally without merit. There is no evidence to support this contention. Furthermore, the defense of concealment is not available to a surety unless the surety's signature is procured by the creditor, or unless the creditor was present when the instrument was executed and then misrepresented or concealed essential facts.

*Magee* v. *Manhattan Life Ins. Company*, 92 U. S. 93.

(b) The contention of the respondent that there was a failure of consideration because the bond filed with the Treasurer and Receiver General was not sealed by the principal, and therefore was not the instrument contemplated by the indemnity agreement, cannot be sustained.

In the first place it should be noted that there are no express provisions in the indemnity agreement that the bond should take the form of an instrument to be executed *by the principal* under seal. A surety often gives a bond to guarantee the performance of a contract or a legal obligation by a principal who does not himself sign the bond. There is no doubt that the instrument which the petitioner executed was its bond. It was signed by the petitioner and sealed with its seal (R. 37-38).

Furthermore, although the indemnity agreement, exhibit 6, refers to the proposed undertaking as a "fireworks bond," it expressly provides on the second page that if the petitioner executes "the suretyship hereinbefore applied for, or other suretyship in lieu thereof," the indemnitor agrees to indemnify the petitioner. The agreement also contains the following provision:

> "VI. That this agreement shall cover not only the suretyship above recited, but all alterations, renewals, extensions or modifications thereof which may be requested or assented to by the principal named in such obligation."

There can be no doubt that the bond which was filed was either the one expressly contemplated by the indemnity agree-

ment, or a modification of it which was assented to by the principal. Mogliani, the principal, signed the bond which was filed, accepted it from the petitioner already signed and sealed by the petitioner, and caused it to be filed with the Treasurer and Receiver General (Findings 14–18, R. 37–38). It appears therefore that there is no basis for a claim that the bond which was filed was not an instrument contemplated by the indemnity agreement.

(c) The claim of the appellant that the instrument filed with the Treasurer and Receiver General was not a bond, and that the petitioner was therefore under no obligation to pay the judgment recovered by Beatrice Ricci against Mario Mogliani, cannot be sustained. The defect in the instrument on which the appellant relies is that there was no wafer opposite the name of Mario Mogliani, but only the word "Seal," which was printed on the form which was signed (See exhibit 1, R. 86A.)

Even if it be assumed that the principal should have sealed the document, and that he could not adopt the printed word "Seal" as his seal, it does not follow that the instrument did not bind the Surety Company. The Surety Company, acting through its representative Mr. Buss, delivered this instrument to Mogliani in the condition in which it now is, expecting that it would be filed in that condition with the Treasurer and Receiver General and intending to be bound by it in that condition. (See Special Master's report, R. 7–8, 18–19; Findings of the District Court 17–18, R. 37–38; testimony of Mr. Buss, R. 49–51, 55–57.) The instrument was signed and sealed by the petitioner (report of Special Master, R. 7–8; Finding of District Court 15, R. 37).

Under these circumstances it is clear that according to Massachusetts law, the petitioner was bound by the instrument.

*Goodyear Dental Vulcanite Co.* v. *Bacon,* 148 Mass. 542.

In the case cited, the principal failed to sign or seal the bond. The bond was given to secure accounting by the principal for

moneys for which he was legally responsible. The Court held that if the surety executed and delivered the instrument in the condition in which it appeared and intended to be bound by it, the surety was liable. In the case at bar, the obligation imposed by law on Mogliani to pay the judgment obtained by Beatrice Ricci corresponds to the obligation to account which was imposed by law on the principal in *Goodyear Dental Vulcanite Co.* v. *Bacon.* Both the case at bar and the case cited are to be distinguished from cases in which, unless the principal signs the instrument in question, he is under no obligation to anyone.

For other cases which hold that if a surety executes and delivers a bond which the principal has failed to sign, the surety is liable on the bond, if the principal is bound by law to perform the same obligation which is secured by the bond, see

Re *Cahill*, 48 Mich. 616.
*Safranski* v. *St. Paul, Minneapolis & Manitoba Railway Co.*, 72 Minn. 185.
*Wild Cat Branch* v. *Ball*, 45 Ind. 213.
*cf. St. Louis Brewing Ass'n* v. *Hayes*, 97 Fed. 859 (C.C.A. 5th circ.).

It is further to be noted that in the case at bar Mogliani was liable on the bond itself, even though he failed to place a seal upon it. The bond was one required by statute before he could lawfully give a public exhibition of fireworks.

The material provisions of the Massachusetts statutes are as follows:

> "Sec. 57C. No person engaged in the business of displaying or exhibiting fireworks shall, by himself or his agents, discharge, fire off, explode or display fireworks at any public exhibition or exhibitions thereof unless he has on file with the state treasurer a bond running to the state treasurer with a surety or sureties approved by him for the penal sum of fifteen thousand dollars, and for such addi-

tional penal sum as the state fire marshal shall determine to be necessary to cover the losses, damages or injuries that might ensue to persons or property by reason of said public exhibition or exhibitions. The bond shall be conditioned upon the payment of any judgment obtained in an action brought against said person so discharging, firing off, exploding or displaying fireworks at any public exhibition or exhibitions thereof, for or on account of any loss, damage or injury resulting to persons or property by reason of the said discharging, firing off, exploding or displaying of said fireworks at said public exhibition or exhibitions; provided that said judgment was obtained in an action brought within a period of twelve months following the date of the public exhibition at which the cause of said action is alleged to have occurred.

"Sec. 57D. Action on a bond filed under the provisions of the preceding section may be brought by any person or persons holding such judgment and may be brought by such person or persons in the name of the state treasurer but for the benefit and use and at the cost and expense of such person or persons so bringing the said action.

"Sec. 57G. Whoever violates any provision of the six preceding sections shall be punished by a fine of not more than five hundred dollars or by imprisonment for not more than six months, or both." (G. L. c. 148, secs. 57C, 57D and 57G, as amended by Acts of 1921, c. 500.)

Under these circumstances there was a sufficient consideration for the agreement of the principal contained in this bond so that he was liable upon it even though he did not seal it.

*United States* v. *Linn*, 15 Peters 290.
*Inhabitants of Boothbay* v. *Giles*, 68 Maine 160.

Incidentally it should be noted that the decision in *Boothbay* v. *Giles* indicates clearly that an instrument in the form of a bond signed by the parties and not sealed should be treated as given "in lieu" of a bond and would therefore be within the language of the indemnity agreement, exhibit 6, quoted above.

The legal situation with respect to this fireworks bond was therefore that the petitioner had signed and sealed a bond securing the performance of an obligation by the principal which was clearly described in the bond; that this obligation of the principal (namely, to pay any judgment rendered against him of the kind described in the bond) was one which was also imposed by law and could be secured by the petitioner's bond; and that Mogliani was also liable on the instrument itself as fully as though he had sealed it.

Accordingly it appears that the petitioner was liable on the bond and the payment of the amount of the judgment recovered by Beatrice Ricci was not a voluntary one.

(d) The respondent also contends that there was no evidence which would warrant the finding made in the Court below that the bond was filed with the Treasurer and Receiver General before September 26, 1927, the date on which Beatrice Ricci was injured. The Special Master found that the bond was filed before the accident (Report, R. 7–8). This finding was confirmed by the District Court (R. 37–38). These findings were based on the evidence produced in the case and on inferences properly drawn therefrom. Mogliani signed the bond in the presence of Mr. Buss on April 18, 1927, and told Mr. Buss that he was going to file it immediately at the State House in Boston (R. 49–50). The fair inference is that it was filed by Mogliani on or about the day he signed it, April 18, 1927. The bond was produced at the trial from the files of the Treasurer and Receiver General by the witness Cynthia W. Arey, who testified that there was no record in the Treasurer and Receiver General's office of the date of filing but it was presumably filed on April 18, 1927 (R. 48).

The witness Oliver B. DiCecca testified that he saw the bond in the office of the Treasurer and Receiver General sometime between September 26, 1927 and October 5, 1927 (R. 64).

The Massachusetts statutes provided that no person engaged in the business of displaying or exhibiting fireworks should dis-

charge or display them at any public exhibition unless he had such a bond on file. The presumption is that this bond was filed before the exhibition was given by Mario Mogliani at which Beatrice Ricci was injured. The law presumes every man, in his private and official character, does his duty, until the contrary is proved.

"It will presume that all things are rightly done, unless the circumstances of the case overturn this presumption according to the maxim, *omina presumuntur rite et solemnitur esse acta, donec probetur in contrarium.*"

*The Bank of the United States* v. *Danbridge et al*, 12 Wheaton 64, 69.

See also *Commonwealth* v. *Carr*, 143 Mass. 84.

*Greenleaf on Evidence*, 16th Ed. Ch. VI. Sec. 40.

One of the most common applications of this presumption of regularity occurs when evidence that a letter was stamped, addressed and mailed is held to warrant an inference that it was received.

The circumstances and evidence in the case at bar clearly warranted the finding made by the Special Master and confirmed by the District Court that the bond was filed with the Treasurer and Receiver General prior to September 26, 1927, the date of the fireworks accident. Under these circumstances the finding should not be set aside on appeal.

*Lawson* v. *U. S. Mining Co.*, 207 U. S. 1, 12.

*Butte & Superior Copper Co. Ltd.* v. *Clark-Montana Realty Co.*, 249 U. S. 12, 30.

Furthermore, it is difficult to see on what ground liability on this bond could be avoided if it were filed after the accident and before the judgment was obtained. The obligation in the bond is to pay the judgment. There is no term in the bond which makes it a condition precedent to recovery that the bond should be filed before the accident.

*Cf. Choate* v. *Arrington*, 116 Mass. 552.

The witness Oliver B. DiCecca found the bond on file at a date not later than October 5, 1927 (R. 64). The action of Beatrice Ricci was brought on April 12, 1928, and judgment in that action was entered on April 10, 1930 (Findings 22, 31, R. 38, 41).

For the reasons which have been set forth it is submitted that none of the defenses against liability on the indemnity agreement which have been set up by the respondent are valid, and that at the date when the petition in bankruptcy was filed, the petitioner was a creditor of the respondent having a provable claim in excess of $500.

e. If the petitioner had a provable claim when the petition was filed, it is not necessary that it should have had such a claim when the act of bankruptcy was committed.

Counsel for the respondent contended in the Court below that even if the petitioner had a provable claim when the petition was filed it had no standing to maintain the petition unless it also had a provable claim at the time of the alleged act of bankruptcy. There is a clear distinction between this proposition and the line of argument adopted by the majority decision in the Court below, which has already been discussed in this brief at pages 18–22. The position of the majority in the Circuit Court of Appeals is merely that a conveyance cannot be made with intent to defraud a creditor, within the meaning of the act, unless there is at least one creditor in existence at the time who has a provable claim. If there is such a creditor, the majority opinion apparently concedes that some other creditor whose claim becomes provable later may bring the petition (*cf.* R. 138). The proposition of counsel for the respondent is that a petitioning creditor cannot complain of an act of bankruptcy that occurred before he was a creditor having a provable claim.

It is submitted that this proposition is not supported either by the statute or by the weight of authority; and that even those decisions which support it recognize an exception in a case

like the one at bar where the conveyance was made with a specific intent to defraud the petitioning creditor.

The part of the Bankruptcy Act which applies is section 59b, printed at page 15 above. This provides that three or more creditors "who have provable claims against any person" (or one, if there are less than twelve creditors) "may file a petition to have him adjudged a bankrupt." The test, according to this section, is whether the petitioner has a provable claim when the petition is filed. To rule that the petitioner who meets this test may *not* file a petition unless he also meets another condition not laid down in the statute (namely, having a provable claim at the time of the act of bankruptcy) produces a result which in many cases would be directly contrary to the statute. It follows that no such ruling should be made.

The weight of authority is to the same effect. It is true that some early cases apparently approved the prosposition for which counsel for the respondent has contended. See

In re *Brinckmann*, 103 Fed. Rep. 65 (Dist. Ind. 1900).
In re *Callison*, 130 Fed. Rep. 987 (S. Dist. Fla. 1903).
*Brake* v. *Callison*, 129 Fed. Rep. 201 (C. C. A. 5th Circ. 1904).
In re *Stone*, 206 Fed. Rep. 356 (E. Dist. Pa. 1913).

The last three of these cases recognize an exception to the proposition in case of a conveyance made with a specific intent to defraud the petitioner. The whole proposition was attacked as contrary to the statute by the decision in the case of In re *Hanyan*, 180 Fed. Rep. 498 (S. Dist. N. Y. 1910). The more recent decisions support In re *Hanyan* in holding that it is sufficient if a petitioning creditor has a provable claim when the petition is filed.

In re *Van Horn*, 246 Fed. Rep. 822 (C. C. A. 3d Circ. 1917).
In re *H. E. Page Motor Car Co.*, 251 Fed. Rep. 318 (Dist. Mass. 1918).
In re *Western Gear Co.*, 53 F. (2d) 644 (E. Dist. Mich. 1931).

**The last case cited was one in which a single creditor brought the petition. It seems obvious that the same rule should apply whether the petition is brought by three creditors or one. While the earlier editions of *Collier on Bankruptcy* supported the proposition that except in case of actual intent to defraud the petitioner, the petitioner is required to have a provable claim at the time of the act of bankruptcy (see quotation, In re *Stone*, 206 Fed. Rep. 356, 357), the last edition of this work recognizes that the weight of authority is to the contrary.**

*Gilbert's Collier on Bankruptcy*, 2d ed. 1931, p. 845.

**2. The conveyance of real estate made by Teresa Marotta on March 18, 1930, constituted an act of bankruptcy.**

The material findings relating to this conveyance are contained in the record at pages 38–41. The testimony and exhibits relating to it are as follows: Arcangelo Marotta, R. 68, 74–78; Frank M. Zottoli, R. 60–62; exhibits 10, 11, 12, 13, 14, R. 110–119; exhibit 21, R. 130. See also, the Master's Report, R. 19–23).

The material provisions of the bankruptcy act are:

> "Section 3. Acts of Bankruptcy.— a. Acts of bankruptcy by a person shall consist of his having (1) conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, any part of his property with intent to hinder, delay, or defraud his creditors, or any of them; . . .
>
> "c. It shall be a complete defense to any proceedings in bankruptcy instituted under the first subdivision of this section to allege and prove that the party proceeded against was not insolvent as defined in this title at the time of the filing the petition against him, and if solvency at such date is proved by the alleged bankrupt the proceedings shall be dismissed, and under said subdivision one the burden of proving solvency shall be on the alleged bankrupt."

At the date when the petition was filed, the respondent had no property in addition to the property which she had transferred on March 18, 1930 (Finding 30, R. 40; Master's Report, R. 23). Under the Bankruptcy Act, property which a person has conveyed with intent to hinder, delay or defraud his creditors is to be excluded in determining whether he is insolvent (§ 1 (15) printed above at page 16). Accordingly if, as has already been shown, the petitioner was a creditor when the petition was filed, it is clear that the respondent was then insolvent.

A copy of the deed of March 18, 1930, which constitutes the alleged act of bankruptcy, is printed as exhibit 10 (R. 110). This deed, which was executed by both Arcangelo Marotta and Teresa Marotta, conveyed three parcels. The first parcel, which is bounded by North and Lewis Streets, is described in the findings of the Court as the Lewis Street property (Findings 5, 26 and 28, R. 35, 39–40; *cf.* exhibit 7 at R. 90G; exhibit 10, R. 110; Master's Report, R. 6, 10–11). This Lewis Street property had belonged to Teresa Marotta when she entered into the indemnity agreement, exhibit 6, and is described in the first two items on the last page of the financial statement, exhibit 7 (Master's Report, R. 19–21, exhibits 6, 7, R. 90A–90G). Teresa Marotta had conveyed this property to her husband on February 23, 1928 (Finding 26, R. 39; exhibit 21, R. 130). The other two parcels included in the conveyance of March 18, 1930, consisted of land on Pleasant Street, Winthrop and land bounded by North, Lewis and Fulton Streets, in Boston, described in this case respectively as the Winthrop property and the Fulton Street property (Findings 5, 28, R. 35, 40; exhibit 10, R. 110). The Winthrop property had been conveyed to Teresa Marotta by James J. Earley by a deed dated May 1, 1919 (exhibit 19, R. 127). The Fulton Street property had been conveyed to her by deed of George L. Clark dated November 27, 1906 (exhibit 18, R. 125). Both the Special Master and the District Court found that the Winthrop property and the Fulton Street property belonged to Teresa

Marotta when she made the deed of March 18, 1930 (Master's Report, R. 19–21; Finding 25, R. 39).

The Special Master and the District Court have also found that this conveyance was made with the specific intent of putting the property beyond the reach of the appellee and with the intent to hinder, delay and defraud the appellee (Master's Report, R. 23; Finding 30, R. 40).

The evidence relating to these findings is found in the record as follows: Frank M. Zottoli, R. 60–62; Pellegrino Muollo, R. 65; Marciano Grella, R. 65–66; Nicola Dello Russo, R. 65; Arcangelo Marotta, R. 66–68, 70–78; William E. Bennett, R. 83–84; and in the exhibits referred to below.

It appears that shortly before the Ricci suit against Mogliani was reached for trial, Arcangelo Marotta had a talk with Mr. Bennett, who was representing Mogliani, in which Arcangelo Marotta was told that Mrs. Marotta was on the bond, that the case was about to go to trial and that a verdict for a very large sum was likely to be rendered. Arcangelo Marotta attended the trial, which lasted several days and resulted in a verdict for $10,000 against Mogliani on March 4, 1930. Arcangelo Marotta consulted his own attorney, Mr. Fralli, during the trial and had an interview with Fralli on the night of the verdict at which he stated that his wife had signed a paper. Fralli told Marotta that "if they lose the case, we have got to pay for it." Fralli went to Providence to see Mr. Buss to ascertain how the papers were made out and when he got back reported to Arcangelo Marotta (Findings 22, 23, R. 38–39; Master's Report, R. 9–10; Testimony of William E. Bennett, R. 83–84; Frank P. Fralli, R. 83; Arcangelo Marotta, R. 76–78, *cf.* R. 72).

On March 15, 1930, eleven days after the verdict in the Ricci suit, Arcangelo Marotta, acting as agent for Teresa Marotta, went to one Zottoli, a lawyer. In consequence of the talk between them, Zottoli prepared the deed of March 18, 1930, from Arcangelo Marotta and Teresa Marotta to Pellegrino Muollo, which is the conveyance already described which is alleged to

be the act of bankruptcy (exhibit 10, R. 110). As has been stated above, this deed covered the Winthrop property and the Fulton Street property, which was all the property which Mrs. Marotta then had, and also the Lewis Street property which she had owned when she signed the indemnity agreement and had conveyed to her husband in 1928. Zottoli also prepared a mortgage from Muollo to one Grella on the Winthrop property for $8,000, a mortgage from Muollo to one Dello Russo on the Lewis Street property for $20,000, a deed from Muollo to Arcangelo Marotta of all the properties, subject to the mortgages, and a declaration of trust by which Arcangelo Marotta declared that he held the property in trust for the children of Mrs. Marotta and himself. The declaration of trust is dated three days before the deeds (Findings 27–29, R. 39–40; Master's Report, R. 10–12; exhibits 11, 12, 13 and 14, R. 112–120). The instruments described were all executed and recorded together on March 19, 1930. All of the conveyances were made without consideration and both Muollo, the grantee, and the two mortgagees were straws who acted as a favor to and at the request of Arcangelo Marotta (Finding 30, R. 40; Master's Report, R. 11–12).

The contentions of the respondent with respect to this question, as disclosed in the assignments of error, may be summarized as follows:

a. That the petitioner was not a creditor at the date of the conveyance, as no final judgment had then been entered in the Ricci suit and the petitioner had then paid nothing; and that as Teresa Marotta then had no other creditors, her conveyance could not have been made with intent to hinder, delay and defraud creditors (Assignments 4, 25, 27, R. 44, 47).

b. That there was no evidence that Teresa Marotta knew that she had signed an indemnity agreement until April, 1930, which was after the date of the conveyance, and, therefore, that at the date of the conveyance she did not know that she had

any creditors and could not have intended to hinder, delay or defraud her creditors (Assignments 22 and 23, R. 47).

c. That Teresa Marotta held the real estate standing in her name on an oral trust for her husband and, therefore, it was not her property which was conveyed (Assignment 24, R. 47).

The first of these contentions, which was sustained by the Circuit Court of Appeals, has already been discussed in this brief at pages 18–24.

The next contention of the respondent, which is that she did not know of the existence of the indemnity agreement until April, 1930, after the date of the conveyance, is entirely inconsistent with the evidence. As has already been shown, the District Court properly found that when she executed the indemnity agreement she knew the nature of the instrument she signed. It further appears that in March, 1928, she had been notified by the letter, exhibit 3, of the accident to Beatrice Ricci and of her own indemnity agreement; and that Arcangelo Marotta, acting as her agent had oral notice from Mr. Bennett of the pending trial of the Ricci suit and of Mrs. Marotta's liability on the bond, before March 4, 1930 (Finding 22, R. 38; Master's Report, R. 9–10, 14–15; testimony of Wm. E. Bennett, R. 83–84; Exhibits 3–5, R. 87–89). The findings and the evidence, therefore, do not support the alleged ignorance on the part of Teresa Marotta on which this contention is based.

The contention of the respondent that she held the real estate standing in her name under an oral trust for her husband, and therefore that it was not her property that was conveyed, is inconsistent with the findings in the case. The Special Master and the District Court have both found that it was her property (Master's Report, R. 6, 20–21; Finding 25, R. 39). The only testimony to the contrary was that given by Mr. and Mrs. Marotta. The Special Master has expressly found that their testimony given in connection with the signing of the indemnity agreement is not credible (Master's Report, R. 14–15). The financial statement which was signed by Mrs. Marotta for the

purpose of inducing the Surety Company to execute the fireworks bond lists the property in question as hers (exhibit 7, R. 90D–90G). Mrs. Marotta had, while she held this property, gone on another fireworks bond and a bail bond as the owner of the real estate (Master's Report, R. 21; Arcangelo Marotta, R. 74; Teresa Marotta, R. 79–80; Antonio Natale, R. 57–58). Arcangelo Marotta testified that when he was first approached by Natale concerning the bond now in question he told Natale that he would have to see his wife, that his wife had the property (Arcangelo Marotta, R. 68–69). Under these circumstances the District Court was fully warranted in finding that the property belonged to the wife.

The fact that Mr. Marotta paid the consideration for the conveyances which were made to his wife in 1906 and 1919 does not show that these transfers were received by her in trust for him; for the presumption is that the property was received as a gift and might be applied for the use and benefit of either or both the spouses.

*Pollock* v. *Pollock*, 223 Mass. 382.
*English* v. *English*, 229 Mass. 11.
*Edgerly* v. *Edgerly*, 112 Mass. 175.
*Cairns* v. *Colburn*, 104 Mass. 274.

This presumption must prevail unless it is rebutted by clear evidence.

*English* v. *English*, 229 Mass. 11.

The only evidence to rebut it is the unsupported testimony of Arcangelo Marotta and Mrs. Marotta. Neither of these is a credible witness. In addition to the interest which they have in the case, there is affirmative evidence already referred to, showing them to be utterly unreliable.

Under these circumstances the finding of the Court below that the wife owned the property was the logical deduction from the evidence. Furthermore, as it was made on conflicting testi-

mony after hearing the witnesses, it should not be reversed on appeal.

There is another aspect of the matter, however, in which it becomes quite immaterial who actually owned the property in question. Both Arcangelo Marotta and Teresa Marotta represented that it was her property for the purpose of inducing the Surety Company to execute the bond. Arcangelo Marotta furnished Mr. Good with the information contained in the financial statement, exhibit 7, which showed the property as belonging to the wife. Mrs. Marotta signed that statement. The petitioner executed the bond in reliance on it (Arcangelo Marotta, R. 73; Buss, R. 51; Finding 16, R. 37; William J. Good, R. 53–55). Both of the Marottas, are, therefore, estopped to assert that the property did not belong to Mrs. Marotta.

*Silver* v. *Roberts Garage, Inc.*, 240 Mass. 571.
*Rioux* v. *Cronin*, 222 Mass. 131, 135.
*North Shore Blue Book Inc.* v. *Burlen*, 256 Mass. 431.

**3. The fact that the alleged bankrupt had only one creditor when the act of bankruptcy was committed and when the petition was filed is not a valid reason for dismissing the petition.**

The respondent claimed in the Circuit Court of Appeals that a single creditor is not entitled to prosecute an involuntary petition in bankruptcy unless there are other creditors in existence, and that if there are no other creditors the Court should dismiss the petition either as a matter of discretion or as a matter of law.

There is nothing in the Bankruptcy Act which supports this contention. The Act expressly authorizes one creditor to bring a petition when the creditors are less than twelve in number, and makes no exception to the effect that one creditor cannot bring a petition if there are not at least two creditors. (See § 59 b, printed at page 15 above.) No such exception can

properly be interpolated into the Act. In this connection it should be noted that under the provisions of section 59a, which reads: — "Any qualified person may file a petition to be adjudicated a voluntary bankrupt," it has been the practice to accept voluntary petitions alleging the existence of only one creditor and to administer estates in bankruptcy upon such petitions.

Usually a petitioner in a contested involuntary bankruptcy cannot know until the trial is over how many creditors the bankrupt has. It would be a harsh rule which would give a fraudulent bankrupt the chance to try all the issues, and after they had been decided against him, to escape adjudication merely because he had one creditor instead of two. It may well be that one of the purposes of the bankruptcy act is to obtain an equal distribution among creditors when there are several. The provisions with reference to preferences are intended for such a purpose. It is equally true that another purpose is to give effective remedies where the bankrupt has transferred or concealed his property with the intent of not paying any creditor. That purpose applies equally to a case where there is a single creditor and to a case where there are several.

**4. The petitioner is not barred from maintaining the petition because of the bills in equity which it brought in the state court.**

Within four months before the petition in bankruptcy was filed the petitioner brought bills in equity in the Superior Court of Massachusetts to have the conveyances of March 18, 1930, set aside as fraudulent and to reach the real estate which was conveyed (Findings 32, 33, R. 41). A temporary injunction was issued in one of these cases against Arcangelo Marotta and the straw mortgagees, restraining them from conveying or encumbering the real estate or foreclosing the mortgages.

These suits have not been tried and are still pending. The respondent contends that these suits and the equitable attachment made in one of them are a bar to the petitioner in the present case (Assignments 14–17, R. 45–46).

This contention is not supported by either the language of the Bankruptcy Act or the decided cases. Section 59b of the Bankruptcy Act (printed at page 15 above) provides that three or more creditors *who have provable claims* (or one, if there are less than twelve creditors) may file a petition against a person. Section 63 of the Act (printed at page 23 above) defines a provable claim in terms which would include the claim which the petitioner had when the petition was filed (see pages 23–24 above). The material portions of other sections of the Bankruptcy Act which should be considered are as follows:

> "Sec. 57. Proof and allowance of claims. — a Proof of claims shall consist of a statement under oath, in writing, signed by a creditor setting forth the claim, the consideration therefor, and whether any, and, if so, what securities are held therefor, and whether any, and, if so, what payments have been made thereon, and that the sum claimed is justly owing from the bankrupt to the creditor.
>
> "g The claims of creditors who have received preferences, voidable under section sixty, subdivision b, or to whom conveyances, transfers, assignments, or incumbrances, void or voidable under section sixty-seven, subdivision e, have been made or given, shall not be allowed unless such creditor shall surrender such preferences, conveyances, transfers, assignments, or incumbrances." (Act of July 1, 1898, c. 541, § 57, 30 Stat. 560; Feb. 5, 1903, c. 487, § 12, 32 Stat. 799; U. S. Code, title 11, § 93.)
>
> "Sec. 60. Preferred Creditors.— b If a bankrupt shall have procured or suffered a judgment to be entered against him in favor of any person or have made a transfer of any of his property, and if, at the time of the transfer, or of the entry of the judgment, or of the recording or registering of the transfer if by law recording or registering thereof is required, and being within four months before the filing of the petition in bankruptcy or after the filing

thereof and before the adjudication, the bankrupt be insolvent and the judgment or transfer then operate as a preference, and the person receiving it or to be benefited thereby, or his agent acting therein, shall then have reasonable cause to believe that the enforcement of such judgment or transfer would effect a preference, it shall be voidable by the trustee and he may recover the property or its value from such person. And, for the purpose of such recovery, any court of bankruptcy, as hereinbefore defined, and any State court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction." (Act of July 1, 1898, c. 541, § 60, 30 Stat. 562; Feb. 5, 1903, c. 487, § 13, 32 Stat. 799; June 25, 1910, c. 412, § 11, 36 Stat. 42; U. S. Code, title 11, § 96.)

Sec. 67. Liens.— e That all conveyances, transfers, assignments, or incumbrances of his property, or any part thereof, made or given by a person adjudged a bankrupt under the provisions of this act subsequent to the passage of this act and within four months prior to the filing of the petition, with the intent and purpose on his part to hinder, delay, or defraud his creditors, or any of them, shall be null and void as against the creditors of such debtor, except as to purchasers in good faith and for a present fair consideration; and all property of the debtor conveyed, transferred, assigned, or encumbered as aforesaid shall, if he be adjudged a bankrupt, and the same is not exempt from execution and liability for debts by the law of his domicile, be and remain a part of the assets and estate of the bankrupt and shall pass to his said trustee, whose duty it shall be to recover and reclaim the same by legal proceedings or otherwise for the benefit of the creditors. . . .

"f That all levies, judgments, attachments, or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment, or other lien shall be deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt, unless the court shall, on due notice, order that the right under such levy, judg-

ment, attachment, or other lien shall be preserved for the benefit of the estate; and thereupon the same may pass to and shall be preserved by the trustee for the benefit of the estate as aforesaid. And the court may order such conveyance as shall be necessary to carry the purposes of this section into effect: Provided, that nothing herein contained shall have the effect to destroy or impair the title obtained by such levy, judgment, attachment, or other lien, of a *bona fide* purchaser for value who shall have acquired the same without notice or reasonable cause for inquiry." (Act of July 1, 1898, c. 541, § 67, 30 Stat. 564; Feb. 5, 1903, c. 487, § 16, 32 Stat. 800; June 25, 1910, c. 412, § 12, 36 Stat. 842; U. S. Code, title 11, § 107.)

The petitioner has no voidable preferences as defined by § 60b, and holds nothing conveyed to it in fraud of creditors such as is described in § 67e. It appears, therefore, that the statute does not sustain the respondent's contention.

The decisions show also that the petitioner is not disqualified. What the petitioner holds is at most an equitable attachment which will be destroyed under the provisions of §67f unless the Bankruptcy Court elects to keep it alive for the benefit of the estate. Furthermore the petitioner offers in the petition to surrender any attachment which it may hold for the benefit of the estate. Even if the petitioner had received a preference, it would be entitled to maintain the petition on compliance with such order as the court might make for surrender of the preference.

In re *Automatic Typewriter & Service Co.*, 271 Fed. Rep. 1 (C. C. A. 2d Circ.).

*Greenville Banking & Trust Co.* v. *Selcow*, 25 F. (2d) 78 (C. C. A. 3d Circ.).

In re *Hornstein*, 122 Fed. Rep. 266.

In re *Murphy*, 225 Fed. Rep. 392.

In the case at bar the automatic destruction of the attach-

ment in accordance with sec. 67f (unless the court elects to keep it alive) will amount to a surrender.

*Keppel* v. *Tiffin Savings Bank*, 197 U. S. 356.

The proceedings which the petitioner brought in the State court were intended to preserve the property for the trustee in bankruptcy by guarding against the danger that it, or the straw mortgages upon it, might be transferred to *bona fide* purchasers. Under these circumstances it is probable that the Bankruptcy Court would elect to preserve the equitable attachment for the benefit of the estate in bankruptcy. In the event, however, that the Court is of the opinion that it should be discharged by some document to be signed by the petitioner, the petitioner is ready to execute any such document.

So far as the respondent's objection based on the suits in the State court may depend on the doctrine of *lis pendens*, there are conclusive answers to it. The pendency of a suit in a State court is no bar to proceedings concerning the same matter in a Federal court having jurisdiction.

*McClellan* v. *Garland*, 217 U. S. 268, 282.
*Gordon* v. *Gilfoil*, 99 U. S. 168, 178.
*Kline* v. *Burke Construction Co.*, 260 U. S. 226, 234.

This is the rule even in cases in which the Federal courts would have concurrent jurisdiction with the State courts. There is an additional reason for its application where the relief sought is one which the United States court alone has jurisdiction to give.

*Photo Drama Motion Picture Co. Inc.* v. *Social Uplift Film Corporation*, 213 Fed. 374.

A further objection to the respondent's contention is that this particular defence, if it were otherwise valid, would be in the nature of a plea in abatement, and is not available to the respondent, who has gone to trial on the merits without pleading it or raising the question on a motion to dismiss.

**5. The general contentions of the respondent that on the record the adjudication was not warranted and was erroneous in law, are not supported.**

These contentions are stated in the form of general conclusions without further specifications (Assignments 1, 2 and 28, R. 44–47). The questions raised by these assignments have already been covered in the argument relating to the more specific assignments of error.

## VI.

## CONCLUSION.

For the reasons which have been stated it is submitted that the decree of the Circuit Court of Appeals should be reversed and that the decree of the District Court adjudicating the respondent a bankrupt should be affirmed.

HARRY LEBARON SAMPSON,
*Counsel for the petitioner.*

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# Supreme Court of the United States.

October Term, 1932.

No. 131.

**American Surety Company of New York,**
Appellant,

v.

**Teresa Marotta,**
Appellee.

## BRIEF FOR THE APPELLEE.

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# Supreme Court of the United States.

OCTOBER TERM, 1932.

No. 131.

AMERICAN SURETY COMPANY OF NEW YORK,
APPELLANT,
*v.*
TERESA MAROTTA,
APPELLEE.

## BRIEF FOR THE APPELLEE.

### STATEMENT OF THE CASE.

This is an appeal by the American Surety Company of New York from a decree of the United States Circuit Court of Appeals for the First Circuit, dated April 4, 1932, dismissing an involuntary petition in bankruptcy filed by the American Surety Company of New York, Appellant, against Teresa Marotta, Alleged Bankrupt, Appellee.

The petition in bankruptcy was filed by the appellant as a single creditor, and sets forth that there were less than twelve creditors. The petition alleges that the petitioner was a creditor to the amount of $7023.78, and that within four months of the filing of the petition the alleged bankrupt conveyed to one Muollo two parcels of real estate; that each conveyance was without consideration and was made by the alleged bankrupt with the fraudulent intent and purpose of putting said real estate beyond the reach of her creditors, including the petitioner.

The petitioner, in the petition, offered to surrender upon adjudication, for the benefit of the estate in bankruptcy, any liens it had acquired by an equitable attachment of the

above-described real estate alleged to be so fraudulently conveyed.

The alleged bankrupt filed an answer denying that she is insolvent, or that she committed the act of bankruptcy alleged in the petition, or that the petitioner is a creditor or has a provable claim against her. The matter was then referred to a master.

Some time prior to 1927 the husband of the alleged bankrupt purchased two parcels of land in Boston and the house where he now lives in Winthrop. While the deeds of the several parcels were paid for by the husband, the deeds were all taken in the name of the wife, but the husband always had attended to the management of the several parcels and collected the rents.

In April, 1927, one Natale, an employee of Mario Mogliani, whose place of business was in Providence, Rhode Island, went to Arcangelo Marotta, husband of the appellee, to seek assistance in obtaining a surety bond. A part of the business of Mogliani was conducting public exhibitions of fireworks. Before giving any such exhibitions in Massachusetts an exhibitor is required by statute (c. 148, secs. 57C and 57D, G.L. Mass.) to file a bond with sufficient sureties with the State Treasurer to answer for any damage to person or property resulting therefrom. While there was some dispute as to what was said by Natale to the Marottas as to the nature of the instrument to be signed, the husband told Natale that he could not sign a bond as the property was in his wife's name. As a result of the conference, Natale and Mr. and Mrs. Marotta went to the office of a lawyer, where Mrs. Marotta, the alleged bankrupt, signed an application for a surety bond, commonly referred to as a "Fireworks Bond," to be executed by Mogliani as principal and the appellant as surety, and running to the Treasurer of the Commonwealth of Massachusetts, and conditioned to protect persons and property from any loss or damage resulting from a public exhibition of fireworks.

In the application for the bond, which was at some time also signed by Mogliani, the applicants were described as indemnitors, and each agreed to hold the appellant harmless in case it was called on as surety to make good any loss or damage to person or property resulting from any exhibition of fireworks given by Mogliani in Massachusetts.

This instrument of indemnity was under seal, and was executed at the office of the lawyer without the knowledge of the appellant, as neither Natale nor the lawyer in any way represented the appellant. In consideration of Mrs. Marotta assuming the obligation of an indemnitor under this instrument, Mogliani paid to her or her husband the sum of $800.

At the time of signing this application, Mrs. Marotta, in the presence of her husband, also signed a statement as to her property, and set forth therein that she had an equity in three parcels of real estate of the value of approximately $60,000 and cash to the amount of $8000. The appellant relied on this statement as true in signing as surety on the bond for Mogliani.

Afterward Mario Mogliani, as principal, signed an instrument purporting to be a bond, but to which he failed to affix his seal, in the penal sum of $15,000, which the appellant signed as surety under its seal. This instrument was delivered to the State Treasurer of Massachusetts, and a certificate that a bond was filed as required by law was issued to the State Fire Marshal and to Mogliani prior to September 26, 1927. While giving a public exhibition of fireworks in the City of Everett on September 26, 1927, one Beatrice Ricci was seriously injured, and claim was made against Mogliani and the appellant was notified as surety on the bond.

The alleged bankrupt was also notified of the claim and that she was liable on the contract of indemnity contained in the application which she signed. On April 12, 1928, an action was brought against Mogliani by Beatrice Ricci, and

Arcangelo Marotta and his wife were also notified of this action. The husband, who, in all matters connected with this case, acted for his wife, consulted counsel, and was notified by counsel for Mogliani that it was a serious matter, and that the appellee might be called on to pay heavy damages under her agreement of indemnity, and suggested it might be better to settle, but Marotta refused, and suggested that the counsel for Mogliani go ahead and try the case.

In February, 1930, the case went to trial, and on March 4, 1930, a verdict against Mogliani was returned for $10,000. Marotta again consulted his counsel, who went to Providence, Rhode Island, where Mogliani's place of business was, and after investigation advised Marotta and the counsel acting for Mogliani that a motion for a reduction of the verdict should be made in the case. On March 5, 1930, a motion for a new trial was filed on the ground that the damages awarded were excessive. On March 30, 1930, the motion was granted, unless a remittitur was filed, which was done, and the damages were reduced to $6540.68 with costs taxed at $110.40. On April 10, 1930, judgment was entered for this amount and an execution issued, on which demand was made upon Mogliani, who was unable to pay.

Following the verdict against Mogliani on March 4, 1930, Arcangelo Marotta went to another lawyer, who knew nothing of the signing of the instrument by which his wife had become an indemnitor of the appellant, or of the verdict against Mogliani; and after some talk about protecting him or his children, Marotta said he wanted a deed made out from his wife to him of certain property which he had bought some time before and had taken the deeds in her name.

On March 18, 1930, a quitclaim deed was executed by the alleged bankrupt and her husband of the two parcels of land referred to and delivered to one Pellegrino Muollo, who afterwards executed two mortgages, one on the Winthrop property and one on the property located on Lewis Street in the City of Boston. The equity in these parcels

was then transferred by Muollo to Arcangelo Marotta in trust for his children. It is not claimed that any consideration passed between Muollo and the Marottas in these transactions.

On April 18, 1930, an action in the name of the State Treasurer was brought on the judgment against the appellant for the benefit of the injured woman. The appellant then paid the amount of the judgment against Mogliani and judgment against the appellant was entered on April 30, 1930.

The appellant in April, 1930, instituted two suits in equity against the appellee, seeking to set aside the conveyances made by the appellee on March 18, 1930, as being fraudulent as to the appellant. On the second suit in equity the property so conveyed on March 18, 1930, was attached and an injunction issued enjoining any further conveyances or encumbering it. On July 18, 1930, the petition in bankruptcy was filed. At the time of filing the petition, and on March 18, 1930, when the alleged fraudulent conveyances were made, the appellant, if a creditor, was the only creditor of the alleged bankrupt.

The appellee's assignments of errors, twenty-eight in number, raise in brief the following issues:

(1) Whether the appellee was induced to sign the contract of indemnity by fraud;

(2) whether she was bound by the contract of indemnity because the bond, when given, did not have attached the seal of the principal;

(3) whether the bond was ever delivered to the State Treasurer at the State House in Boston prior to the exhibition on September 26, 1927, at which the Ricci girl was injured;

(4) whether the appellant was a creditor of the appellee on March 18, 1930, and, if so, whether the conveyances made by the appellee on that date were made to hinder, delay, or defraud the appellant;

**(5) and if the appellant was not a creditor of the alleged bankrupt on March 18, 1930, whether the appellant could alone file an involuntary petition in bankruptcy against the appellee, even if, at the time of filing the petition, it had a provable claim;**

**(6) and whether, having begun an action in the State Courts seeking to set aside the conveyances alleged to be fraudulent, the appellant should in equity be left to its remedy in the State Court.**

Of these issues, the United States Court of Appeals considered only the fourth and fifth, which in effect are: that the conveyances on March 18, 1930, did not constitute an act of bankruptcy as defined in section 3 of the Bankruptcy Act, since the appellant was not a creditor as defined in section 1 (9) of the Act at the time of these transfers; and if the petitioner at the time of the alleged act of bankruptcy was not a creditor as defined in the Act, it alone could not file an involuntary petition in bankruptcy, even though it had a provable claim at the time of filing the petition.

## Argument.

The appellee, although relying principally upon the fourth and fifth issues as forming the basis for the decision of the United States Circuit Court of Appeals for the First Circuit, respectfully argues and insists that the petition in bankruptcy should be dismissed on all of the six grounds hereinafter set forth:

I. The indemnity agreement in question was signed by the appellee Teresa Marotta, alleged bankrupt, by mark (Exhibit 6), on the original record. Both Teresa Marotta and Arcangelo Marotta are illiterate and unable to read or write either English or Italian, or to sign their names except by a mark. Teresa Marotta, although she has lived in this country over thirty years, neither speaks nor understands English, except to a very limited extent. (This is the findings of fact by the master, 4.)

Mr. and Mrs. Marotta testified that one Antonio Natale procured her signature to the indemnity agreement (Exhibit 6) and the financial statement (Exhibit 7) by representing to her that she was to become responsible on an attachment bond for $1000, and that when Mr. and Mrs. Marotta went to Mr. Good's office where she signed this document, the papers were there all prepared, and she merely signed them and acknowledged them.

This indemnity agreement was then sent from Mr. Good's office in Boston, Mr. Good being an attorney representing Antonio Natale, who was procuring the bond for his employer, one Mogliani of Centredale, Rhode Island, to Mr. Buss, the duly accredited representative of the American Surety Company in Providence, who thereafter issued the surety bond in which Mogliani was principal and the American Surety Company was surety, and the Commonwealth of Massachusetts the obligee, without any further inquiry or correspondence on the part of the American Surety Company with Teresa Marotta.

Whether a contract of indemnity has been made or not in this case depends upon the fact as to whether the said Teresa Marotta knew of the contents and agreed to it, in view of the special circumstances that she was an illiterate person and could not read or write English and signed the said contract by her mark.

*McKenney* v. *Boston & Maine R.R.*, 217 Mass. 274:

In this case it is reported that the signature by mark calls to the attention of the contracting party the fact that the person who is signing by mark may be an illiterate person, and may not know of the contents of the instrument that he is purporting to sign, and hence there is no meeting of the minds to consummate a contract; and more especially in this case, the American Surety Company, the contracting party, being a company organized to write bonds of various kinds involving fraud, theft, forging, and various other defalca-

tions and weaknesses of human beings, should have communicated at least with Teresa Marotta before issuing the surety bond, in view of the signature by mark, to make certain that she knew of the contents of the said instrument at least to the extent of the nature of the instrument, the amount for which she could be liable and such other matters as would justify the Surety Company in going on the fireworks bond, so called. As to the legal effect of the withholding by the one party executing a surety bond of material facts affecting the risk, and the legal effect of misrepresentations or non-disclosures concerning the bond, see—

*Province Securities Corp.* v. *Maryland Casualty Co.*, 269 Mass. 75.

II. Whether Teresa Marotta was bound by the contract of indemnity because the bond when given did not have the seal of the principal.

The appellee Teresa Marotta is not liable on the contract of indemnity because of failure of consideration.

In this case the existence of the bond was a prerequisite for liability on the part of Teresa Marotta. There would be no liability on her contract of indemnity unless the American Surety Company gave a valid bond in this case.

*Burdett* v. *Walsh*, 235 Mass. 153, at 154—

where it was held the existence of a note was a prerequisite of liability, the bond being conditioned upon the guarantee of payment of the note.

*Cook* v. *Finger*, Mass. 1930 Advance Sheets, 209:

"The satisfaction of every condition precedent is essential to the petitioner's case."

"The claim against the surety or indemnitor in this case is strictissima juris."

*Warren* v. *Lyons*, 152 Mass. 310, at 312.
*Bacon* v. *Chesney*, 1 Stark, N.P. 192.

"A precedent condition . . . must be performed or happen before liability arises on the promises which the condition qualifies."

Williston on Contracts, vol. II, sec. 666a, p. 1284.

It is the contention of the appellee in this case that the said bond upon which Mario Mogliani was principal and the American Surety Company was surety, and the Commonwealth of Massachusetts was the obligee, was not a valid obligation because of the failure of the said bond to have a seal annexed to it after the principal's name. The testimony in this case shows that this seal was deliberately left off, whereas Mr. Buss testified it was a perfectly legal seal without the necessity of a sticker if it has a bracket saying L. S. or a seal. The appellee objected to the introduction of Exhibit 1 as a bond, on the ground that the principal did not seal the bond, and counsel for the petitioner admitted that there was no seal thereon, but stated that the cases say it is immaterial under the circumstances.

"It is elementary law that a bond imports a seal."

*Mahoney* v. *Emergency Fleet Corp.*, 253 Mass. 234.

*Cox & Dick* v. *United States*, 6 Peters, 172, page 195.

"A bond, no matter how solemnly expressed, subscribed and delivered is of no validity unless it has the authority of the wax."

"A bond is merely an obligation under seal."

*Commonwealth* v. *Smith*, 10 Allen, 448, 455 (Mass.).

As is said in Williston, Contracts, c. 205:

"The obligation of the maker of a sealed instrument under the common law depends wholly on certain forms

> being observed. If the forms are observed the obligation is binding. The instrument is not evidence of an obligation, it is the obligation itself."

The converse of this is equally true, that if the instrument bears no seal, it is not a bond, and the obligation does not exist. The common law as to bonds has been adhered to with some strictness in this Commonwealth. It was said in *Burns* v. *Lynde,* 6 Allen, 305 (Mass.), at page 312, respecting a bond, that—

> "it is highly useful that a class of instruments should exist, to which persons may resort with a feeling of confidence that they shall not be binding till they are formally executed, and that when thus executed they shall not be liable to be varied or controlled."

Other cases emphasize the necessity of a seal in order to constitute a bond.

*Banorgee* v. *Hovey,* 5 Mass. 11, 24.
*Tasker* v. *Bartlett,* 5 Cush. 359, 364.
*Bates* v. *Boston & New York Central R.R.,* 10 Allen, 251, 254, 256.
*Hendee* v. *Pinkerton,* 14 Allen, 381, 389.
*Macurda* v. *Fuller,* 225 Mass. 341, 344.
*United States Drainage & Irrigation Co.* v. *Medford,* 225 Mass. 467, 470.

This is the law of the Supreme Court of the United States. In *Koshkonong* v. *Burton,* 104 U.S. 668, at page 673, it was said:

> "The word 'bond' at common law (and even now as a general rule) imports a sealed instrument."

In *DeGanay* v. *Lederer,* 250 U.S. 376, at page 381, occur these words quoted from *Blackstone* v. *Miller,* 188 U.S. 189, 206:

"Bonds . . . are more than merely evidences of debt. The debt is inseparable from the paper which declares and constitutes it, by a tradition which comes down from more archaic conditions. Bacon v. Hooker, 177 Mass. 335, 337."

It is contended by the appellee in this case that this is an official bond, the obligee being the Commonwealth of Massachusetts, and in contemplation of law the place of making the contract and the performance are in Massachusetts, and the validity, obligation, and interpretation of this bond is to be determined by the law of the Commonwealth of Massachusetts, and by the State laws of Massachusetts. This instrument is not a valid bond, there being no seal opposite the name of the principal.

It is further the appellee's contention that the consideration for the indemnity agreement has failed in that it was conditioned upon the American Surety Company giving a bond; that they did not in fact issue a bond, and therefore there is no liability on the appellee's part.

III. Whether the bond was ever delivered.

There was an additional defense suggested; namely, that there was no evidence in the case that, after the Surety Company bond was executed, it was ever delivered at the State House at Boston, Massachusetts, before the accident that was later sued, or that it was delivered at the State House at the time the accident happened on account of the fireworks exhibition on September 26, 1927, out of which accident a personal injury suit was brought, and later recovery on the bond was had.

On this contention, the testimony of Cynthia W. Arey, who testified twice as to the date when the bond was filed at the State House, was that she was connected with the office of the Treasurer and Receiver General. At first she testified it was filed in April, 1927, presumably April 18th, for an exhibition on April 19, 1927; that she acknowledged the

bond to the State Fire Marshal and sent a certificate to the principal, no copy of which she produced at the trial; that the State Fire Marshal's office told her they could not find the certificate, so that she has not the date, but goes by the date on the bond entirely as being the reason as to why she testified that the bond was presumably filed on April 18, 1927; that in fireworks bonds they have printed certificates; that the State Fire Marshal's office in the Commonwealth of Massachusetts did not have a copy of the certificate in their files in this matter; that they found a little correspondence that was kept, but nothing to show on what date the bond was filed.

Being later recalled and asked to make further search, she testified she made further search and there was no record in her office of the Treasurer and Receiver General of the Commonwealth of Massachusetts as to when the bond was received, and that she called at the State Fire Marshal's office, and they had nothing in their files, and had evidently destroyed the certificate sent to them.

On the above record it is contended by the respondent that there is no evidence upon which the master can find that the bond was delivered at the State House on or before September 26, 1927, when the accident occurred, and that there was no evidence to support the master's finding of fact on request No. 14.

> No. 14: "On April 18, 1927, Raymond Buss, acting for the petitioner, delivered to Mario Mogliani a written instrument (hereinafter called the bond) which was subsequently filed by Mogliani with the treasurer and receiver general of the Commonwealth of Massachusetts and approved by the State fire marshal and the treasurer and receiver general at some time before September 26, 1927."

IV. Whether the appellant was a creditor of the appellee on March 18, 1930, and, if so, whether the conveyances made

by the appellee on that date were made to hinder, delay, or defraud the appellant.

V. And if the appellant was not a creditor of the alleged bankrupt on March 18, 1930, whether the appellant could alone file an involuntary petition in bankruptcy against the appellee, even if, at the time of filing the petition, it had a provable claim.

These two issues, 4 and 5, are considered together, which in effect are: that the conveyances on March 18, 1930, did not constitute an act of bankruptcy as defined in section 3 of the Bankruptcy Act, since the appellant was not a creditor as defined in section 1 (9) of the Act at the time of these transfers; and if the petitioner at the time of the alleged act of bankruptcy was not a creditor as defined in the Act, it alone could not file an involuntary petition in bankruptcy, even though it had a provable claim at the time of filing the petition, there being no other creditors on March 18, 1930.

It will be observed that Teresa Marotta at the time of the alleged fraudulent conveyance had no other creditors, if we except the American Surety Company, nor did she have any other creditors even at the time the involuntary petition in bankruptcy was filed against her.

Section 3 of the Bankruptcy Act, in defining acts of bankruptcy, provides that it shall consist of a person "having (1) conveyed, transferred, concealed or removed . . . any part of his property with intent to hinder, delay or defraud his creditors, or any one of them"; and section 1 (9) of the Act provides that, as used in the Act, the word " 'Creditor' shall include anyone who owns a demand or claim provable in bankruptcy."

The petition in bankruptcy in this case alleges, as the only act of bankruptcy, that the conveyances by Marotta and his wife on March 18, 1930, were made with the intent to hinder, delay, and defraud the petitioner; but the alleged bankrupt in her answer and her counsel in argument deny that the petitioner was a creditor having a claim provable in

bankruptcy at that time; and contend that in order for a fraudulent transfer to constitute an act of bankruptcy, the creditor hindered, delayed, or defrauded must be a creditor with a provable claim at the time.

Counsel for petitioner, however, contends that this is not necessary; that it is sufficient if the petitioner has a provable claim at the time of filing the petition, and cites *In re Van Horn,* 246 Fed. 822. The case cited is not in point, since it appears in that case that there were creditors with provable claims at the time the alleged act of bankruptcy was committed; and, an act of bankruptcy having been committed, any creditor having a provable claim at the time of filing of the petition in bankruptcy is entitled to share in the distribution of the assets and may join in the petition, though he had no provable claim at the time the act of bankruptcy was committed, which is all that the Van Horn case holds.

The contention of the appellee is that a fraudulent transfer, to constitute an act of bankruptcy, must hinder, delay, or defraud a creditor or creditors holding a claim or claims provable in bankruptcy at the time the act is committed: Without an act of bankruptcy an involuntary petition cannot be maintained under section 3 (b) of the Act.

Was the claim of the petitioner against the appellee a provable claim on March 18, 1930?

A transfer made with an intent to defraud a contingent creditor, or even subsequent creditors, may be set aside in the State Courts or by a trustee in bankruptcy under section 70 (e)—

Collier on Bankruptcy (13th ed.), p. 1770;
*Thomson* v. *Crane,* 73 Fed. 327;
*Kautz* v. *Sheridan,* 118 Me. 28;
*Holbrook* v. *International Trust Co.,* 220 Mass. 150;
*Mowry* v. *Reed,* 187 Mass. 174—

but under the Bankruptcy Act of 1898 contingent claims are not provable in bankruptcy, though unliquidated claims may be, if the liability is fixed by contract.

Section 63 (b) of the Bankruptcy Act.
Collier on Bankruptcy (14th ed.), p. 1419.
*In re American Vacuum Cleaner Co.*, 192 Fed. 939.
*In re Inman & Co.*, 171 Fed. 185.
*In re Brinckmann*, 103 Fed. 65.

A claim arising out of a tort—the action against Mogliani was based on negligence—is contingent, and is not provable in bankruptcy until reduced to a judgment.

*In re Brinckmann, supra.*
*Beers* v. *Hanlin*, 99 Fed. 695.

A verdict alone does not result in that "fixed liability" defined in section 63 as necessary to constitute a provable claim—

Collier on Bankruptcy (13th ed.), p. 1387;
*Black* v. *McClelland*, Fed. Cases, 1462;
*In re Ostrom*, 185 Fed. 988—

since a verdict is not conclusive. A motion to set aside a verdict, though based on excessive damages alone, may be granted unless a remittitur is filed, and this cannot be determined until action is had thereon by the Court and plaintiff.

While the relations between the petitioner and the alleged bankrupt in this case were contractual, the petitioner's rights and the appellee's obligations under the contract of indemnity were both contingent until the judgment was entered against Mogliani on April 10, 1930. The alleged fraudulent transfers having been made on March 18, 1930, at which time the petitioner did not have a provable claim against the alleged bankrupt, no act of bankruptcy was com-

**mitted thereby within the definition of section 3 (1) of the Act, since no creditor, as defined in section 1 (9) was thereby hindered, delayed, or defrauded.**

**VI. Whether, having begun an action in the State Courts seeking to set aside the conveyances alleged to be fraudulent, the appellant should in equity be left to its remedy in the State Court.**

**The appellee's motion for dismissal of petition should have been granted on the general principles of equity.**

**Bankruptcy is a general suit in equity as an aid to all creditors, citing—**

> *In re Maryanov,* 20 Fed. (2d) 939, on page 943, U.S. D.C. N.Y.
> *Corbett* v. *Riddle,* 209 Fed. 811, C.C.A. Va.

There is nothing that the American Surety Company can secure in the United States Court in these proceedings that it could not have secured in the two petitions brought in the State Court to establish its claim there and set aside the same conveyances which in the present case it alleged as her acts of bankruptcy. There are no other creditors in this case with the exception of the appellant, and it is well recognized that the general purposes of the Bankruptcy Court are for a proper distribution of the assets of the bankrupt equitably amongst all the bankrupt's creditors. Indeed, in the State Court proceedings brought by the petitioner, the various rights between the parties as to the existence of the petitioner's claim, as to the validity of the bond, as to whether the bond was ever delivered, as to whether there was a contract entered into between the American Surety Company and Teresa Marotta, as to whether there was a fraudulent conveyance or a conveyance by Teresa Marotta which was valid in law—all these matters are peculiarly governed by the laws of the Commonwealth of Massachusetts and the rules of evidence and the rights of the parties can better be protected and determined in the

State Court, and a more complete hearing had on the merits of the controversy with subsequent protection to either of the parties in the event of mistaken or uncertain principles of law and evidence involved in said issues that can be corrected by the proper tribunals.

It would seem that the interests of justice would best be served by dismissing the present proceedings, and compelling the American Surety Company to seek its remedy in the Court where it first instituted the proceedings. There is nothing that the creditor can get in the United States Court that could not be secured in the State Court.

*In re Maryanov*, 20 Fed. (2d) 939.

In fact it is suggested that the relief in the State Court is more complete and comprehensive in that if the American Surety Company is successful in this State Court proceeding, the decree there would be that the petitioner's claim would be established, that the conveyance be set aside, that the various grantees of the parcels of real estate alleged to be fraudulently conveyed (and they are all parties to the State Court proceeding) be ordered to hold the said property in trust for the petitioner, and the petitioner would receive full and adequate satisfaction of its claim. Here in the United States Court the decree of adjudication merely adjudicates Teresa Marotta a bankrupt on a record which shows that she has no creditors, and after a trustee will be appointed who will be compelled to bring a suit to set aside these various conveyances, and the trustee in bankruptcy will be in the same position after adjudication as the American Surety Company was before it started in on the proceedings either in the State or in the Federal Court.

I need not cite authorities for the general proposition that an adjudication in bankruptcy is not *res judicata* of the fraudulent conveyances as against grantees and parties therein named.

**Therefore, it is respectfully submitted by the respondent, Teresa Marotta, that this Court in its discretion should grant the respondent's motion to dismiss the proceedings on general principles of equity, and on the general authority of estoppel, that the petitioner be estopped from proceeding in the United States Court after having instituted proceedings in the State Court in equity as above described.**

It is the contention of the appellee, Teresa Marotta, that the findings of fact of the referee are not supported by the evidence, are clearly against the weight of the evidence, and that the conclusions of law are erroneous, and the same contention is made against the order of the district judge in entering the final decree ordering the adjudication.

No act of bankruptcy having been committed, the petition must be dismissed, citing—

*In re Stone*, 206 Fed. 356.
*Horbach* v. *Hill*, 112 U.S. 144.
*Brake* v. *Callison*, 129 Fed. 221.
*Re Callison* (D.C.), 130 Fed. 988; affirmed sub nom. *Corin Mfg. Co.* (D.C. Mass.), 185 Fed. 976.
*In re Hanyan* (Southern District of New York), 180 Fed. 498.
*Perry* v. *Whitney Co.* (D.C. Mass.), 172 Fed. 745.

Respectfully submitted,

GEORGE I. COHEN,
JOSEPH SANTOSUOSSO,
Attorneys for
TERESA MAROTTA,
Alleged Bankrupt, Appellee.

# SUPREME COURT OF THE UNITED STATES.

No. 131.—October Term, 1932.

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| American Surety Company of New York, Petitioner, *vs.* Teresa Marotta. | On Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit. |

[January 9, 1933.]

Mr. Justice Butler delivered the opinion of the Court.

July 16, 1930, petitioner claiming to be a creditor of respondent in an amount exceeding $7,000 filed a petition in bankruptcy against her in the United States district court for Massachusetts. It alleged that on March 18, 1930, she conveyed her property with intent to hinder, delay and defraud her creditors including the petitioner and that she was insolvent. Respondent's answer denied that she committed the alleged act of bankruptcy or was insolvent or that petitioner was a creditor or had a provable claim against her. The court heard the case on evidence taken by, and the report of, a special master, made findings of fact and adjudged respondent a bankrupt. The Circuit Court of Appeals reversed. 57 F. (2d) 830.

The substance of the findings, so far as material to our decision, may be briefly stated:

Under date of April 18, 1927, one Mogliani as principal and petitioner as surety executed a bond for $15,000 to the treasurer of the Commonwealth of Massachusetts to secure, among other things, the payment of any judgment that might be obtained in an action against the principal for injury resulting to any person by reason of the discharge of fireworks by him at a public exhibition. The bond was made and delivered pursuant to Massachusetts G. L., 1921, c. 148, § 57 C, D. Acts, 1921, c. 500. Petitioner became surety in accordance with an application executed by respondent and in reliance upon her agreement to indemnify it against every claim or liability arising on the bond. The application and agree-

ment were accompanied by a financial statement made by her showing that in addition to considerable cash she owned several pieces of real estate worth much more than the amount of the bond. September 26, 1927, one Beatrice Ricci was injured by fireworks discharged at a public exhibition under the direction of Mogliani. She sued him for damages and, March 4, 1930, got a verdict for $10,000. March 18 respondent conveyed all her real estate to one Muollo and on the same day he mortgaged a part of it and quitclaimed all to her husband to be held by the latter in trust for the benefit of their children. These conveyances covered all respondent's property and were made without consideration and with specific intent on her part to hinder, delay and defraud the petitioner, her only creditor. The verdict having been reduced, judgment was entered April 10, 1930, in favor of Ricci and against Mogliani for $6,650.48. Unable to collect from him, she demanded payment from petitioner. And April 18, 1930, conformably to the statute, a suit on the bond was brought against petitioner to recover for her the amount of the judgment. Some time before it filed the petition in bankruptcy petitioner paid to her attorney the sum claimed and judgment was entered against it for that amount.

The Circuit Court of Appeals sustained respondent's contention that to constitute an act of bankruptcy, a fraudulent transfer must hinder, delay or defraud a creditor holding a claim provable at the time of such conveyance and held that petitioner's claim against respondent was contingent and not provable until the entry of the judgment against Mogliani and that therefore respondent committed no act of bankruptcy. And it directed the district court to dismiss the petition.

Unless required by the Act, the meaning of the word "creditors" as used in § 3a (1) is not to be restricted to those whose claims are provable at the time of the fraudulent conveyance.

Section 1 declares: "The words and phrases used in this Act and in proceedings pursuant hereto shall, unless the same be inconsistent with the context, be construed as follows: . . . (9) 'creditor' shall include anyone who owns a demand or claim provable in bankruptcy, and may include his duly authorized agent, attorney, or proxy". 11 U. S. C., § 1. And § 3a contains the following: "Acts of bankruptcy by a person shall consist of his having (1) conveyed, transferred, concealed, or removed, or per-

mitted to be concealed or removed, any part of his property with intent to hinder, delay, or defraud his creditors, or any of them". 11 U. S. C.,§ 21a. The decision below shows that at common law the word "creditors" has a broader meaning. But the court construed the definition of creditor, § 1 (9), to be comprehensive and the word "include" to be one of limitation, the equivalent of "include only", and to exclude every person not having a demand presently provable. Its ruling that respondent's transfer of her property to defraud petitioner was not an act of bankruptcy rests upon that construction.

In definitive provisions of statutes and other writings, "include" is frequently, if not generally, used as a word of extension or enlargement rather than as one of limitation or enumeration. *Fraser* v. *Bentel*, 161 Cal. 390, 394. *People ex rel. Estate of Woolworth* v. *S. T. Comm.*, 200 App. Div. 287, 289. *Matter of Goetz*, 71 App. Div. 272, 275. *Calhoun* v. *Memphis & P. R. Co.*, Fed. Cas. No. 2,309. *Cooper* v *Stinson*, 5 Minn. 522. Subject to the effect properly to be given to context, § 1 prescribes the constructions to be put upon various words and phrases used in the Act. Some of the definitive clauses commence with "shall include", others with "shall mean". The former is used in eighteen instances and the latter in nine instances, and in two both are used. When the section as a whole is regarded, it is evident that these verbs are not used synonymously or loosely but with discrimination and a purpose to give to each a meaning not attributable to the other. It is obvious that, in some instances at least, "shall include" is used without implication that any exclusion is intended. Subsections (6) and (7), in each of which both verbs are employed, illustrate the use of "shall mean" to enumerate and restrict and of "shall include" to enlarge and extend. Subsection (17) declares "oath" shall include affirmation. Subsection (19) declares "persons" shall include corporations, officers, partnerships, and women. Men are not mentioned. In these instances the verb is used to expand, not to restrict. It is plain that "shall include" as used in subsection (9) when taken in connection with other parts of the section cannot reasonably be read to be the equivalent of "shall mean" or "shall include only".

There being nothing to indicate any other purpose, Congress must be deemed to have intended that in § 3a (1) "creditors" should be given the meaning usually attributed to it when used in the common law definition of fraudulent conveyances. See *Coder* v. *Arts,* 213 U. S. 223, 242. *Lansing Boiler & Engine Works* v. *Ryerson,* 128 Fed. 701, 703. *Githens* v. *Shiffler,* 112 Fed. 505. Under the common law rule a creditor having only a contingent claim, such as was that of the petitioner at the time respondent made the transfer in question, is protected against fraudulent conveyance. And petitioner, from the time that it became surety on Mogliani's bond, was entitled as a creditor under the agreement to invoke that rule. *Yeend* v. *Weeks,* 104 Ala. 331, 341. *Whitehouse* v. *Bolster,* 95 Me. 458. *Mowry* v. *Reed,* 187 Mass. 174, 177. *Stone* v. *Myers,* 9 Minn. 287, 294. *Cook* v. *Johnson,* 12 N. J. Eq. 51. *American Surety Co.* v. *Hattrem,* 138 Ore. 358, 364. *U. S. Fidelity & Guaranty Co.* v. *Centropolis Bank,* 17 F. (2d) 913, 916. *Thomson* v. *Crane,* 73 Fed. 327, 331.

As the Circuit Court of Appeals, upon constructions of §§ 1 (9) and 3a (1) which we hold erroneous, disposed of the case without deciding other questions there raised, the decree will be reversed and the case will be remanded to that court for further consideration and proceedings in harmony with this opinion.

*Reversed and remanded.*

A true copy.

Test:

*Clerk, Supreme Court, U. S.*